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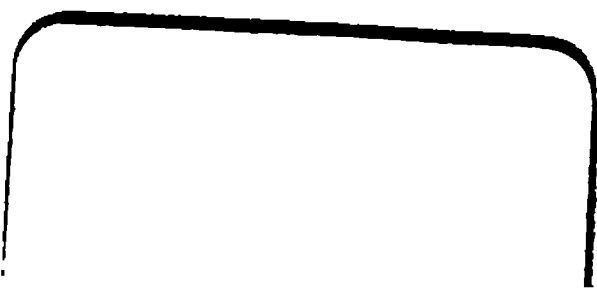
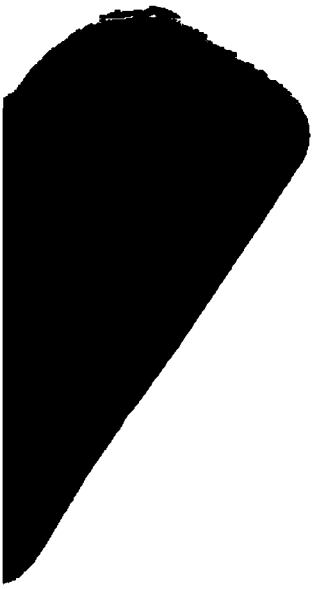
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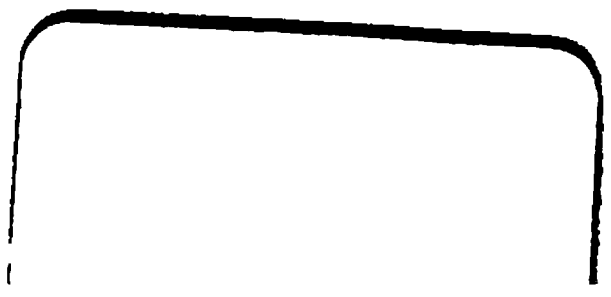
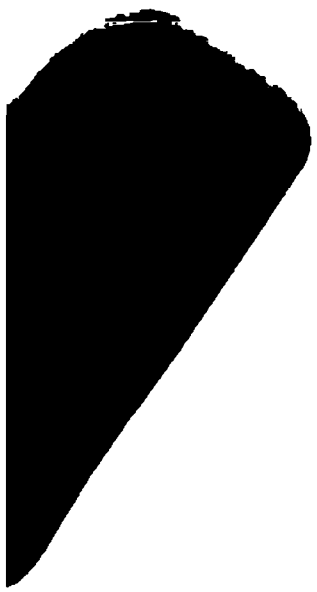
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THE
AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

Vol. XXXVII.

CONTAINING ALL CASES OF GENERAL AUTHORITY IN THE FOLLOWING
REPORTS:

25 ARKANSAS; 64 GEORGIA; 97 ILLINOIS; 72 INDIANA; 54 IOWA;
26 KANSAS; 129 MASSACHUSETTS; 26 MINNESOTA; 72 MISSOURI;
15 NEVADA; 81 NEW YORK; 82 NEW YORK; 84 NORTH CARO-
LINA; 92 PENNSYLVANIA STATE; 14 SOUTH CAROLINA;
53 TEXAS; 16 WEST VIRGINIA; 51 WISCONSIN.

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SCHEDULE

OF STATE REPORTS FROM WHICH CASES HAVE BEEN SELECTED FOR THE AMERICAN REPORTS.

The volumes of State Reports are in parenthesis, and the volumes of American Reports in heavy letter.

- Alabama (44) 4; (45) 6; (46) 7; (47) 11; (48) 17; (49, 50) 20; (51, 52) 23; (53, 54) 25; (55, 56) 28; (58) 29; (59, 60) 31; (61) 32; (62) 34; (63) 35.
- Arkansas (25) 4; (26) 7; (27) 11; (28) 18; (29, 30) 21; (31) 25; (32) 29; (33) 34; (34) 36; (35) 37.
- Baxter (Tenn.) (1) 25; (2) no cases; (3, 4) 27; (5) 30; (6, 7) 32; (8) 35.
- Bush (Ky.) (7) 8; (8) 8; (9) 15; (10) 19; (11) 21; (12) 23; (13) 26; (14) 29.
- California (39) 2; (40) 6; (41, 42) 10; (43, 44, 45, 46) 13; (47, 48) 17; (49, 50) 19; (51) 21; (52) 28; (53) 31; (54) 35; (55) 36.
- Colorado (1) 9; (2, 3) 25; (4) 34.
- Connecticut (36) 4; (37, 38) 9; (39) 12; (40) 16; (41, 42) 19; (43) 21; (44) 26; (45) 29; (46) 33; (47) 36.
- Florida (13) 7; (14) 14; (15) 21; (16) 26; (17) 35.
- Georgia (40) 2; (41, 42) 5; (43, 44) 9; (45, 46) 12; (47, 48, 49, 50) 15; (51, 52, 53, 54, 55, 56) 21; (57, 58) 24; (59, 60) 27; (61) 34; (62) 35; (63) 36; (64) 37.
- Grattan (Va.) (20) 8; (21) 8; (22) 12; (23) 14; (24, 25) 18; (26, 27) 21; (28, 29) 26; (31) 31; (30) 32; (32) 34; (33) 36.
- Heiskell (Tenn.) (1) 2; (2) 5; (3) 8; (4, 5) 13; (6, 7) 19; (8, 9) 24; (10, 11, 12) 27.
- Houston (Del.) (3) 11; (4) 15.
- Illinois (51) 2; (52) 4; (53, 54) 5; (55, 56) 8; (57, 58) 11; (59, 60, 61, 62, 63) 14; (64, 65, 66, 67) 16; (68, 69) 18; (75, 76, 77, 78) 20; (70, 71, 72, 79, 80) 22; (73, 74)* 24; (81, 82, 83, 84) 25; (85) 28; (86, 87) 29; (88) 30; (89) 31; (90) 32; (91) 33; (92, 93, 94) 34; (95) 35; (96) 36; (97) 37.
- Indiana (32) 2; (33) 5; (34) 7; (35) 9; (36, 37, 38) 10; (39, 40, 41, 42, 43) 13; (44, 45, 46) 15; (47, 48) 17; (49, 50, 51) 19; (52, 53) 21; (54, 55) 23; (56, 57, 58, 59) 26; (60, 61) 28; (62, 63) 30; (64) 31; (65, 66) 32; (67) 33; (68) 34; (69) 35; (70, 71) 36; (72) 37.
- Iowa (27) 1; (28, 29) 4; (30) 6; (31, 32) 7; (33, 34) 11; (35, 36) 14; (37, 38, 39) 18; (40, 41, 42) 20; (43) 22; (44, 45) 24; (46) 26; (47) 29; (48) 30; (49) 31; (50) 32; (51) 33; (52) 35; (53) 36; (54) 37.
- Kansas (5, 6) 7; (7, 8, 9) 12; (10, 11, 12) 15; (13, 14) 19; (15, 16, 17) 22; (18) 26; (19, 20) 27; (21) 30; (22) 31; (23) 33; (24) 36; (25) 37.
- Lea (Tenn.) (1) 27; (2, 3) 31.
- Louisiana (22) 2; (23) 8; (24, 25) 13; (26, 27) 21; (28) 26; (29) 29; (30) 31; (31) 33; (32) 36.
- MacArthur (District of Columbia) (1, 2) 29; (3) 36.

* The hiatus in the Illinois Reports arises from the fact that the volumes between the 69th and the 73th were published after the 73th and three succeeding volumes.

- Maine** (57) 2; (58) 4; (59) 8; (60) 11; (61) 14; (62) 16; (63, 64) 18; (65) 20; (66) 22; (67) 24; (68) 28; (69) 31; (70) 35; (71) 36.
- Maryland** (31) 1; (32, 33) 2; (34, 35) 6; (36, 37) 11; (38, 39, 40) 17; (41, 42, 43) 20; (44) 22; (45, 46) 24; (47) 28; (48) 30; (49, 50) 33; (51) 34; (52, 53) 36.
- Massachusetts** (100) 1; (101, 102) 3; (103) 4; (104) 6; (105) 7; (106) 8; (107) 9; (108) 11; (109) 12; (110) 14; (111, 115) 15; (112, 116) 17; (113) 18; (114, 117, 118) 19; (119) 20; (120) 21; (121, 122) 23; (123) 25; (124) 26; (125) 28; (126) 30; (127) 34; (128) 35; (129) 37.
- Michigan** (19) 2; (20, 21) 4; (22) 7; (23, 24) 9; (25, 26) 12; (27, 28) 15; (29, 30, 31) 18; (32, 33) 20; (34) 22; (35, 36) 24; (37) 26; (40) 29; (38) 31; (41) 32; (39) 33; (42) 36.
- Minnesota** (15) 2; (16, 17, 18) 10; (19, 20, 21) 18; (22) 21; (23) 23; (24) 31; (25) 33; (26) 37.
- Mississippi** (42) 2; (43) 5; (44, 45) 7; (46, 47, 48) 12; (49, 50) 19; (51, 52, 53) 24; (54) 28; (55) 30; (56) 31; (57) 34.
- Missouri** (46) 2; (47) 4; (48, 49) 8; (50, 51) 11; (52, 53, 54) 14; (55, 56, 57, 58) 17; (59, 60, 61, 62, 63) 21; (64, 65, 66) 27; (67) 29; (68) 30; (69) 33; (70) 35; (71) 36; (72) 37.
- Montana** (1, 2) 25; (3) 35.
- Nebraska** (3, 4) 19; (5) 25; (6, 7) 29; (8) 30; (9) 31; (10) 35.
- Nevada** (6) 2; (7) 8; (9) 16; (10, 11) 21; (12) 28; (13) 29; (14) 33; (15) 37.
- New Hampshire** (48) 2; (49) 6; (50) 9; (51) 12; (52) 13; (53) 16; (54, 55) 20; (56) 22; (57) 24.
- New Jersey** (34) 3; (35) 10; (36) 18; (37) 18; (38) 20; (39) 23; (40) 29; (41) 32; (42) 36.
- New Jersey Equity** (33) 36.
- New York** (41, 42) 1; (43, 3) 4; (44) 4; (45) 6; (46, 47) 7; (48) 8; (49, 50, 51) 10; (52) 11; (53, 54) 13; (55) 14; (56, 57) 15; (58, 59) 17; (60, 61) 19; (62, 63) 20; (64) 21; (65) 22; (66, 67, 68) 23; (69) 25; (70) 26; (71) 27; (72) 28; (73) 29; (74) 30; (75) 31; (76) 32; (77) 33; (78) 34; (79) 35; (80) 36; (81, 82) 37.
- North Carolina** (65) 6; (66) 8; (67, 68, 69) 12; (70) 16; (71) 17; (72, 73, 74) 21; (75, 76) 22; (77, 78) 24; (79) 28; (80) 30; (81) 31; (82) 33; (83) 35; (84) 37.
- Ohio** (19) 2; (20) 5; (21) 8; (22) 10; (23) 13; (24) 15; (25) 18; (26) 20; (27, 28) 22; (29) 23; (30, 31) 27; (32) 30; (33) 31; (34) 32; (35) 35.
- Oregon** (3) 8; (4) 18; (5) 20; (6) 25; (7) 33; (8) 34.
- Pennsylvania** (62) 1; (63, 64, 65) 3; (66, 67) 5; (68, 69) 8; (70, 71) 10; (72, 73) 13; (74, 75) 15; (76, 77) 18; (78, 79, 80) 21; (81, 82) 22; (83, 84) 24; (85, 86) 27; (87) 30; (88) 32; (89) 33; (90) 35; (91) 36; (92) 37.
- Rhode Island** (8) 5; (9) 11; (10) 14; (11) 23; (12) 34.
- South Carolina** (1 N. S.) 7; (2, 3, 4) 16; (5) 22; (6, 7) 24; (8) 28; (9, 10) 30; (11, 12) 32; (13) 36; (14) 37.
- Texas** (32) 5; (33, 34) 7; (35, 36, 37) 14; (38, 39, 40, 41, 42) 19; (43, 44, 45) 23; (46, 47, 48) 26; (49) 30; (50, 51) 32; (52) 36; (53) 37.
- Texas Ct. App.** (1, 2) 28; (3, 4) 30; (5, 6, 7) 32; (8) 34; (9) 35.
- Vermont** (42) 1; (43) 5; (44) 8; (45) 12; (46) 14; (47) 19; (48) 21; (49) 24; (50) 28; (51) 31; (52) 36.
- Washington** (1) 34.
- West Virginia** (4) 6; (5) 13; (6) 20; (7, 8) 23; (9, 10, 11) 27; (12) 29; (13) 31; (14) 35; (15) 36; (16) 37.
- Wisconsin** (24) 1; (25) 3; (26) 7; (27, 28, 29) 9; (30, 31) 11; (32, 33) 14; (34, 35, 36) 17; (37) 19; (38, 39) 20; (40, 41) 22; (42) 24; (43, 44) 28; (45) 30; (46, 47) 32; (48) 33; (49) 35; (50) 36; (51) 37.

LIST OF JUDGES

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* Died May 14, 1890.

† Elected November 2, 1880, vice Sanford E. Church.

‡ Appointed January 1, 1881, vice Charles J. Folger, elected Chief Judge.

LIST OF JUDGES.

vii

NORTH CAROLINA.

WILLIAM N. H. SMITH, CHIEF JUSTICE.
THOMAS S. ASHE,
THOMAS RUFFIN.

PENNSYLVANIA.

GEORGE SHARSWOOD, CHIEF JUSTICE.
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ISAAC G. GORDON,
EDWARD M. PAXSON,
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HENRY McIVER,
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ROBERT S. GOULD,
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WEST VIRGINIA.

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ALPHEUS F. HAYMOND,
CHARLES P. T. MOORE,
OKEY JOHNSON.

WISCONSIN.

ORSAMUS COLE, CHIEF JUSTICE.
WILLIAM P. LYON,
DAVID TAYLOR.
HARLOW S. ORTON,
JOHN B. CASSODAY.

INDEX OF PAGES

AT WHICH THE DIFFERENT STATE REPORTS MAY BE FOUND.

	PAGE.
ARKANSAS	1-52
GEORGIA	53-94
ILLINOIS	95-138
INDIANA	139-182
IOWA	183-236
KANSAS	237-294
MASSACHUSETTS	295-394
MINNESOTA	395-416
MISSOURI	417-453
NEVADA	454-467
NEW YORK	468-601
NORTH CAROLINA	602-646
PENNSYLVANIA	647-713
SOUTH CAROLINA	714-743
TEXAS	744-762
WEST VIRGINIA	763-807
WISCONSIN	808-852

TABLE OF CASES REPORTED.

	PAGE.		PAGE.
Abrahams, Hier v.....	589	Brown v. Banner Coal & O. Co	105
Adams, Kellogg v.....	815	Brown, Jones v	185
Adler v. State.....	48	Brush v. Barrett ..	569
Ah Sam, State v	454	Bryant, Boyd v.....	6
Americus v. Eldridge ..	89	Bryson v. Lucas.....	634
Anderson v. Spence.....	162	Buckles v. Ellers	153
Aschermann, Seaman v	849	Buckley, Graves v	249
Atkinson, Steele v.....	728	Burhans v. Hutcheson.....	274
Attorney-General v. Collier	117	Burnett v. Gustafson..	190
Aultman, Wilcox v.....	92	Burnett v. Snyder	537
Austin v. Huntsville Coal and M. Co	446	Burrill v. Dollar Sav. Bank	639
Avery v. Wilson	508	Bynum, First Nat. Bank v	604
		Byrne, Bast v.....	841
Babbitt, Crispin v.....	521		
Bank of Charleston, Nat. Bkg. Asso. v.		Carnall, Weaver v....	22
Zorn	733	Carpenter v. City of Cohoes ..	468
Banner Coal and C. Co., Brown v.....	105	Cary, Hun v.....	546
Barber, Chariton v.....	209	Case, Neil v	259
Barber v. Fire & M. Ins.Co.....	800	Castello, Edgar v ..	714
Barnett v. Nelson	183	Central Congregational Soc., Davis v ...	363
Barrett, Brush v.	569	Central Nat. Bank, Dickinson v	351
Bast v. Byrne	841	Chariton v. Barber	209
Baughman v. Shenango & A. R. Co.....	690	Charleston, Gillison v	763
Bennett v. North B., etc., Ins. Co....	501	Charlotte, C. & A. R. Co., Pegram v....	639
Bentley v. Doggett	397	Chicago, Gavin v.....	99
Berlin, Fitzgerald v.....	814	Chicago, B. & Q. R. Co., Pyne v	193
Bircher's Exr., Wright v	423	Church, Phoenix Ins. Co. v.....	494
Bloomfield v. Trimble	212	City of Berlin, Fitzgerald v....	814
Board of Comra. Grant Co. v. Bradford..	174	City of Chariton v. Barber... ..	209
Board of Education, Powell v	123	City of Charleston, Gillison v.....	763
Bogart, People's Bank v	461	City of Chicago, Gavin v.....	99
Boone County v. Jones.....	229	City of Cohoes, Carpenter v.....	468
Bort, In re	255	City of Davenport, Stanley v.....	216
Boston Five C. Sav. Bk., Pierce v	371	City of Emporia v. Soden.....	265
Boston, French v	393	City of New Bedford, Pierce v.....	387
Boston & M. R. R., Comm. v	332	City of Newburyport, Cole v.....	394
Boston, Union Inst. for Sav. v.....	305	City of Parkersburg, Johnson v.....	779
Boudrou, Thirteenth & F. St. Pass. Ry.		City of Weatherford, Brennan v..	753
Co. v	707	Clafin, Hershfield v.....	237
Boyce v. Williams.....	613	Clark, Hershy v.....	1
Boyd v. Bryant.....	6	Clayton, Nulton v.....	213
Boylston Natl. Bank, Wood v.....	366	Clinton Water W. Co., Davis v	185
Bracken v. Dillon	70	Cohen, Hatch v	630
Bradford, Board of Commissioners v....	174	Cohoes, Carpenter v.....	468
Bredin's Appeal	677	Cole v. City of Newburyport ..	394
Brennan v. City of Weatherford	753	Cole, Dodge v	111
Brill v. Tuttle	515	Collier, State v	417
Brown, Ex parte	493	Commonwealth v. Boston & M. R. R ..	332

TABLE OF CASES REPORTED.

	PAGE.		PAGE.
Commonwealth, Gordon v.....	673	Gainey v. People	109
Commonwealth v. Gray.....	378	Gary, Dial v.....	737
Commonwealth v. Ketner.....	692	Gavin v. Chicago.....	99
Cone v. Delaware, etc., R. Co.	491	Gerdes v. Weiser	239
Conn. Mut. Life Ins. Co., Wheeler v.....	594	Gibbs v. Williams.....	241
Connecticut R. Lumber Co., Harrigan v.	387	Gillison v. City of Charleston....	83
Conrad v. Lane.....	412	Goodman v. Litaker.....	608
Coon, Shultz v	839	Goodwin v. Smith.....	144
Cooper v. Pogue	681	Gordon v. Commonwealth.....	673
Copeland, Eicks v.....	760	Gordon, McCauley v	68
Cowles v. Richmond & Dan. R. Co	620	Grant County v. Bradford.....	174
Cox v. State... ..	76	Graves v. Buckley.....	249
Crawford County, Stebbins v.....	687	Gray, Commonwealth v	378
Crispin v. Babbitt.....	521	Green v. Hewitt	102
Cronin v. People	564	Grissler v. Powers	475
Curry v. Mayor, etc., of Savannah	74	Gustafson, Burnett v	190
Davenport, Stanley v	216	Haines v. Lewis	202
Davis v. Central Congregational Soc	868	Halloren, Railroad Co. v	744
Davis v. Clinton Water W. Co	185	Halstead v. Seaman.....	536
Davis v. Mayor, etc., of Macon	60	Ham, Stoddard v.....	369
Dauchy, Ormes v....	583	Hannibal & St. J. R. Co., Sherman v	423
Decker, Troewert v	808	Hannibal & St. J. R. Co., Welsh v.....	440
Delaware, etc., R. Co., Cone v.....	491	Hanover F. Ins. Co., McKeage v....	471
Dial v. Gary.....	737	Harrigan v. Conn. R. Lumber Co.....	387
Dickason v. Williams.....	816	Harris v. Lynn	253
Dickinson v. Central Nat. Bank	351	Hart, Faulkner v	574
Dillon, Bracken v	70	Hatch v. Cohen... ..	630
Dodge v. Cole	111	Hawley, Whitaker v	277
Doggett, Bentley v	827	Henrice, Phila. C. Pass. Ry. Co. v.....	699
Doherty, Roosevelt v	356	Henry, Jones v	624
Dollar Savings Bank, Burrill v	669	Herrman v. Merchants' Ins. Co.	488
Dutruit, Lefebvre v... ..	833	Hershfield v. Clafin.....	237
Edgar v. Castello	714	Hershy v. Clark	1
Eicks v. Copeland.....	760	Hestonville, M. & F. Pass. Co. Ry., Smith v	705
Eldridge, In re.....	558	Hewitt, Green v	102
Eldridge, Mayor, etc., of Americus v....	89	Hiatt v. Williams	433
Ellers, Buckles v.....	156	Hier v. Abrahams.....	539
Ellis, McCleary v.....	205	Hinckley v. Union Pac. R. Co.....	297
Emporia v. Soden	265	Holden v. Fitchburg R. Co.....	343
Estabrook, Turner v	371	Holman v. Price	614
Ex parte Brown.....	426	Horan, McCormick v	479
Ex parte White	466	Houston, etc., R. Co. v. Willie.....	736
Fairbanks, Mass. Gen. Hospital v	303	Hovey, Jordan v	447
Faulkner v. Hart	574	Humboldt Ins. Co., Mears v	647
Fawcett v. Nat. Life Ins. Co.....	95	Hun v. Cary	544
Fhalor, Ruddell v.....	177	Hunt v. Purdy.....	587
Fire & M. Ins. Co., Barber v	800	Hunt, Savings Bank v	449
First Nat. Bank of New Windsor v. By- num	604	Huntsman, Stadtfield v.....	661
Fitchburg R. Co., Holden v	343	Huntsville Coal & M. Co., Austin v ..	446
Fitzgerald v. City of Berlin	814	Hutcheson, Burhans v.....	274
Foley, State v.....	458	Hutchins, Texas Bkg. Co. v	750
Foose v. Whitmore.....	572	Hynes v. McDermott	533
Fowler, Vaughan v.	731	International, etc., R. Co., Stewart v	753
Frear Stone Co., Union Mut. Life Ins. Co. v.	129	Intoxicating Liquor Cases	284
French v. Boston	893	Jacobs, Parker v	724
		Jarman, King v.....	11

TABLE OF CASES REPORTED.

xiii

	PAGE.		PAGE.
January, Peel v.....	27	Moore, Patton v.....	789
Jenkins, State v....	643	Moore, Wharton v ..	687
Johnson v. City of Parkersburg	779	Morrill v. St. Anthony Falls W. P. Co....	399
Johnston v. Speer	675	Mulholland, People v	568
Johnson v. Thompson.....	153		
Jones, Boone Co. v.....	229	Nat. Bank of The Commonwealth, Tal-	
Jones v. Brown.....	185	bot v	302
Jones v. Henry.....	694	Nat. Bank of Newberne, Robinson v ..	508
Jones, Neely v	794	National Life Ins. Co., Fawcett v	95
Jordan v. Hovey.....	447	Neal, Rhodes v.....	98
		Neely v. Jones	794
Kellogg v. Adams.....	815	Neil v. Case	259
Kelley, Steamers v.....	170	Nelson, Barnett v....	183
Kendall, School Town of Monticello v ..	139	New Bedford, Pierce v	387
Ketner, Commonwealth v ..	692	Newburyport, Cole v.	394
King v. Jarman. ..	11	North B., etc., Ins. Co., Bennett v	501
Kronkop v. Shontz.....	817	North Pacific R. Co., Wilson v	410
		Nulton v. Clayton	213
Lancaster, Pender v.....	720		
Lane, Conrad v	412	O'Brien, Pierce v ..	360
Langdon, Penn. R. Co. v	651	O'Connor v. State.....	58
Larrabee v. Mulholland	568	Ormes v. Dauchy	583
Lavake, State v.....	415	Overton v. Matthews	9
Lawrence Mfg. Co. v. Lowell H. Mills..	332		
Lee v. State.....	67	Packard v. Taylor ...	87
Leeman v. State	44	Parker v. Jacobs ..	724
Lefebvre v. Dutruit....	883	Parkersburg, Johnson v	779
Lewis, Haines v.....	202	Patton v. Moore.....	789
Litaker, Goodman v	608	Peel v. January.....	27
Looney v. McLean	295	Pegram v. Charlotte, C. & A. R. Co.....	639
Low, Wayne Co. Savings Bank v.....	533	Pender v. Lancaster.....	720
Lowell Hosiery Mills, Lawrence Manu-		Pennsylvania R. R. Co. v. Langdon..	651
facturing Co. v	332	People, Cronin v	564
Lucas, Bryson v.....	634	People, Gainey v	109
Lynn, Harris v	253	People v. Mulholland	568
		People's Bank of New York v. Bogart...	481
McCanley v. Gordon.....	68	Phenix F. Ins. Co., Redmon v	830
McCleary v. Ellis	205	Philadelphia C. Pass. Ry. Co. v. Henrice	699
McCormick v. Horan	479	Phoenix Ins. Co. v. Church	494
McDermott, Hynes v	533	Pierce v. Boston Five C. Sav. Bank.....	371
McIntosh v. Lytle.....	410	Pierce v. City of New Bedford.....	387
McKeage v. Hanover F. Ins. Co.....	471	Pierce v. O'Brien	399
McLean, Looney v	295	Pittsburg & Conn. R. Co. v. Sentmeyer	684
Macon, Davis v ..	60	Pogue, Cooper v	681
Manufacturers' Nat. Bank v. Thompson	376	Pool, Reynolds v.....	607
Mason v. Wilson ...	612	Powell v. Board of Education.....	123
Massachusetts General Hospital v. Fair-		Powers, Grissler v	475
banks	303	Price, Holman v	614
Massachusetts Ins. Co., Whiting v	817	Purdy, Hunt v.....	587
Matthews, Overton v	9	Pyne v. Chicago, B. & Q. R. Co.....	198
Mayor, etc., of Americus v. Eldridge....	89		
Mayor, etc., of Macon, Davis v.....	60	Railroad Co. v. Halloren.....	744
Mayor, etc., of Savannah, Curry v.....	74	Redmon v. Phenix Fire Ins. Co.....	830
Mears v. Humboldt Ins. Co ..	647	Reynolds v. Pool.....	607
Merchants' Ins. Co., Herrman v	483	Reynolds v. Robinson.....	555
Miller v. Smith ..	407	Rhodes v. Neal.....	93
Minneapolis & St. P. Ry. Co., St. P. & S.		Richardson v. Snider.....	169
C. R. Co. v... ..	404	Richmond & Dan. R. Co., Cowles v	620
Montgomery's Appeal.....	670	Robinson v. Natl. Bank of Newberne ..	503

TABLE OF CASES REPORTED.

	PAGE.		PAGE.
Robinson, Reynolds v.....	555	Stokes v. Tift	75
Roosevelt v. Doherty.....	356	Story Co., Whiting v	189
Ross v. Ross.....	321		
Ruddell v. Fhalor.....	177	Talbot v. Natl. Bank of the Com.....	303
		Taylor, Packard v	37
Savannah, Curry v.....	74	Templeton v. Voshloe	150
Savannah & O. C. Co., Watts v.....	53	Texas Banking Co. v. Hutchins	750
Savings Bank of Hannibal v. Hunt	449	Thirteenth & F. St. Pass. Ry. Co. v.	
School Town of Monticello v. Kendall...	139	Boudrou.....	707
Schultz v. Coon	339	Thompson, Johnson v... ..	153
Seaman v. Aschermann.....	349	Thompson, Manufac. Natl. Bank v.....	376
Seaman, Halstead v	536	Tift, Stokes v	75
Sentmeyer, Pitts. & Conn. R. Co. v	634	Torinus, State v	395
Shaver v. Shaver.....	194	Town of Bloomfield v. Trimble	312
Shenango & A. R. Co., Baughman v.....	690	Trimble, Bloomfield v.....	312
Sherman v. Hannibal & St. J. R. Co.....	433	Troewert v. Decker	303
Shisler v. Vandike.....	702	Turner v. Estabrook	371
Shontz, Krouskop v.....	317	Tuttle, Brill v	515
Smith, Goodwin v.....	144		
Smith v. Hestonville, M. & F. Pass. Co.		Union Inst. for Savings v. Boston.....	305
Ry	705	Union Mut. L. Ins. Co. v. Frear Stone Co	129
Smith, Miller v.....	407	Union Pacific R. Co., Hinckley v.....	297
Smith v. State	345		
Smith, State v	192	Vandike, Shisler v.....	702
Smith, Wittouski v.....	632	Vaughan v. Fowler	731
Snider, Richardson v	163	Voshloe, Templeton v.....	150
Snyder, Burnett v.....	527		
Soden, Emporia v.....	365	Watts v. Savannah & O. C. Co	53
Speer, Johnston v.....	675	Wayne Co. Savings Bank v Low.....	533
Spence, Anderson v.....	162	Weatherford, Brennan v	754
St. Anthony Falls W. P. Co., Morrill v...	399	Weaver v. Carnall.....	22
St. Paul & Sioux C. R. Co. v. Minneapolis		Weiser, Gerdes v	239
& St. L. Ry. Co.....	404	Welsch v. Hannibal & St. J. R. Co..	440
Stadtfield v. Huntsman	661	Wharton v. Moore..	627
Stanley v. Davenport	216	Wheeler v. Conn. Mut. L. Ins. Co.....	594
State, Adler v... ..	43	Whitaker v. Hawley	277
State v. Ah Sam.....	454	White, Ex parte	466
State v. Collier.....	417	Whiting v. Story Co	189
State, Cox v.....	76	Whiting v Mass. Ins. Co	317
State v. Foley.....	453	Whitmore, Foose v	572
State v. Jenkins.....	643	Wilcox v. Aultman	92
State v. Lavake	415	Williams, Boyce v	613
State, Lee v	67	Williams, Dickason v	316
State, Leeman v.....	44	Williams, Gibbs v.....	341
State, O'Connor v	53	Williams, Hiatt v.....	433
State v. Smith.....	192	Willie, Houston, etc., R. Co. v.....	754
State, Smith v.....	345	Wilson, Avery v	503
State v. Torinus.	395	Wilson, Mason v	612
Stebbins v. Crawford County.....	667	Wilson v. North Pacific R. Co.....	410
Steele v. Atkinson ..	723	Wittkowski v. Smith ..	632
Steinmetz v. Kelly	170	Wood's Appeal	694
Stewart v. International, etc., R. Co....	753	Wood v. Boylston National Bank.....	306
Stoddard v. Ham	399	Wright v. Bircher's Executor.....	433
		Zorn, Bank of Charleston Bkg. Asso. v..	732

TABLE OF CASES CITED.

PAGE.	PAGE.
Abbott v Plumb, Doug. 316	436
Abercrombie v Ely, 60 Mo 23	190
Ackens v Winston 7 C E Green, 444..	315
Acker v Ledyard, 8 Barb. 514	368
Acton v Lundell 12 M. & W. 363....	370
Adams v Carter 33 Ga. 180	611
Adams v City of Rome, 50 Ga 763. .	74
Adams v Field, 25 Mich. 16	149
Adams v Palmer, 51 Me 450	389
Adams v Gay 19 Vt. 458	308
Adams v Walker, 34 Conn. 466 ...	152, 789
Adams v Way 23 Conn 419	310
Adams & Thompson v Russell, 20 Vt. 205..	251
	254
Alea Mills v. Brookline, 157 Mass. 69 ..	278
Alea Mills v Waltham, 126 Mass. 423 ..	273
Alkman v Alkman, 3 Marq. 534	287
Albee v. Griffin, 2 Dev. & Bat. Eq. 9 ..	685
Albro v. Agawam Canal, 6 Cush. 73. 345.	623
Aldrich v. Ames, 9 Gray, 76	165
Aldrich v. Yelham, 1 Gray, 510	380
Alger v. Scott, 54 N. Y. 14	680
Alford v. Lott 3 B Monr. 349	51
Allen v. New Gas Co. 1 Ex D 251	349
Allen v. Wells, 22 Pick. 450	239
Alton v. Ins. Co., 30 N. C. 323.	480
Alton v. Hape, 68 Ill. 187	775
Alford v. Collier, 20 Pick. 429	420
Ambler v. Bradley 6 Vt. 119	410
American Ins Co v Padfield 78 Ill. 167.	480
Ames v. Union Ins Co., 14 N. Y. 258 ..	308
Amey v Long, 9 East 173	429
Amos v Hughes, 1 Mood & Rob 464 ..	143
Amo-kang Mfg Co v Speer 2 Sandf.	
489	386
Anderson v. Anderson, 8 Ohio, 108	23
Anderson v. Scott, 1 Campb. 233, nota.	
235	17, 30
Andrews v. Keith, 34 Ala. 727.	239
Andrews v. Kneeland, 6 Crw. 354	329
Andrews v. Mathews, 154 Mass. 109	333
Andrews v. Russell, 7 Blackf. 774	398
Aspach v. Brown, 7 Watta, 140	689
Appleby v. Erie County Savings Bank,	
4 N. Y. 12	670
Appleton v. Binks, 5 East, 147	671
Arson v. Arson, 3 Denio, 456.	104
Armington v. Houston, 38 Vt. 448.	686
Armstrong v. Toler, 11 Wheat. 356	204
Arthur v. Mosby, 2 Bibb. 369	447
Ashby v Bates, 15 M. & W 590	749
Ashby v. White, 2 Ld Raym. 938	787
Ashford v. Tustin, Lovell's Monthly	
Dig. 1882, p. 289	383
Ashley v Port Huron, 25 Mich. 206; 34	
Am. Rep. 532	775
Ashley v Walcott, 11 Cush. 193. 243, 247.	786
Ashuelot R. R. v. Elliot, 57 N. H. 397 ..	311
Atchison v. Challis, 9 Kans. 608	764, 767
Atchison & Nebraska R. Co. v. Garfield,	
10 Kans. 142	232, 236
Atkins v. Bally, 9 Verg. 111	252
Atkins v. Saxton, 77 N. Y. 196	341
Atkinson v. Webb, 2 Vern. 478	587
Atlee v. Packet Co., 21 Wall 306	401
Attorney-General v. Metropolitan R.	
Co., 125 Mass. 515; 28 Am Rep. 284. .	284
Attwood v. Small, 8 Cl. & Fin. 382; id.	
443-7.	489
Augusta, etc., R. Co. v. Benz, 56 Ga.	
125.	713
Aurora v. Gillett, 56 Ill. 129	774
Aurora v. Reed, 57 Ill. 30; 11 Am. Rep. 1.	774
Austen v Miller, 5 McLean, 159	577
Austin v. Dye, 46 N. Y. 500	685
Austin v. Rodman, 1 Hawke, 71	686
Autrey v. Frieze, 68 Ala. 587	611
Avery v. Melkie, Louisville Ch.	285
Avilla v. Nash, 117 Mass. 318	346
Ayer v. Bartlett, 6 Pick. 71	687
Aymar v. Sheldon, 12 Wend 439; 27 Am.	
Dec. 187.	677
Babb v. Clemson, 10 S. & R. 419; 13 Am.	
Dec. 684	684
Babcock v United States, 3 Dill. 567 ..	432
Bacon v Eccles, 43 Wis. 267	841
Badger v American Ins. Co., 103 Mass.	
344, 4 Am Rep 547	3, 8
Badger v Williams, 1 D. Chip. 187. .	204
Baehr v Wolf, 59 Ill. 470	204
Bailey v Bartolly, 29 Ga. 502	71
Bailey v Buck, 11 Vt. 232	204
Bailey v Harris, 8 Iowa, 339	685
Bailey v Mills, 27 Tex. 434	761
Bailey v Ogden, 3 Johns. 390; 3 Am.	
Dec. 609	19
Bailey v Taylor, 11 Conn. 531.	261
Bailey v Woburn, 126 Mass. 419	273
Bainbridge v Owen, 2 J. J Marsh. 465.	184
Baker v Preston, 1 Gilin. (Va.) 235 ..	22
234, 236	234, 236
Baldwin v. N. Y. Life Ins. Co., 3 Bosw.	
580	588
Baldwin v. Post, 23 Tex. 706	761
Baldy v. Parker, 2 B. & C 37	18
Dallard v. Burgett, 40 N. Y. 314 ...	605, 687
Baltimore v. Appold, 42 Md 442	480
Baltimore City Pass. R Co v. Wilkin-	
son, 30 Md 224	711
Rangor v. Lansil, 51 Me 521	706
Bank v Blake, 73 N Y 200	319
Bank v Campbell, 2 Rich Eq 191	736
Bank v Gay, 63 Mo. 33; 5 C., 21 Am.	
Rep. 430	806
Bank v. Lanier, 11 Wall. 369	384, 384
Bank v Taylor, 62 Mo. 336	623
Bank of British America v. Ellis, U. S.	
C. Ct.	677
Bank of Cape Fear v. Wright, 3 Jones,	
376	686
Bank of Georgia v. Lewin, 45 Barb. 340.	534
Bank of Kentucky v. Adams Ex. Co., 8	
Otto, 174.	41
Bank of Metropolis v. New England	
Bank, 1 How. 234	397
Bank of Salina v. Babcock, 21 Wend.	
499	686

TABLE OF CASES CITED.

xvii

	PAGE.		PAGE.
Bent v. Carter, 2 Low. 498	498	Butterfield v. Forrester, 11 East. 69	173
Brewster v. Dennis, 21 Pick. 287	287	Byars v. Wendell, 20 N. H. 222	244
Brewster v. Hammett, 4 Conn. 240	240		
Brewster v. Wakefield, 25 How. 113	113	Cabill v. Bigelow, 18 Pick. 229	229
		Caldwell v. Bartlett, 8 Duer, 223	223
Bricker v. Bricker, 11 Ohio St. 240	240	Caldwell v. Cassidy, 8 Cow. 371	709
Brickner v. N. Y. C. R. Co., 2 Lans. 324	324	Caldwell v. Pittsburgh, etc., 11 Co. 74	74
		Penn. St. 421	710
Bridgeport v. Houghton & Co., 15 Conn. 476	476	Caldwell v. N. J. St. Co., 47 N. Y. 222	444
Bridgeport Bank v. N. Y. & N. H. R. Co., 20 Conn. 213	213	Calkins v. Lockwood, 17 Conn. 184	184
Bridgewater v. Inhab. of Plymouth, 97 Mass. 229	229	Callender v. Marsh, 1 Pick. 489	700
Brigham v. Palmer, 3 Allen, 420	420	Caroden & Amboy R. R. Co. v. Raddauf, 4 Harr. 67	670
Bright v. Boyd, 1 Story, 479	479	Campbell v. Seaman, 28 N. Y. 229; 20 Am. Rep. 557	576
Brinkley v. Brinkley, 30 N. Y. 104; 5 O. 10 Am. Rep. 420	440	Camp's Appeal, 22 Conn. 22; 4 Am. Rep. 29	223
Brown v. St. Paul & Sioux City R. Co., 20 Minn. 114	401, 402	Canal Appraisers v. People, 17 Wend. 371	400
Brown v. Turner, 6 N. H. 409	344	Canal Co. v. Clark, 12 Wall. 311	309
Brown v. Houghton, 24 Eng. L. & Eq. 226; 11 Exch. 408	272	Canant v. Seneca Co. Rk., 1 Ohio St. 200	264
Broadway Bank v. McElwraith, 13 N. J. Eq. 24	254	Carey v. Berkshire R. Co., 1 Cush. 478	777
Brook v. Woodbury, 20 Conn. 129	297	Carey v. Sheets, 67 Ind. 216	147
Brooklyn v. Brooklyn, 57 N. Y. 301	301	Carl v. Stillwater R. R. & Transfer Co., Minn.	229
Brooks v. Hargreaves, 21 Mich. 254	254	Carmichael v. Ray, 1 Rich. 116	726
Brooks v. Martin, 2 Wall. 79	204	Carpenter v. Longan, 10 Wall. 371	276
Brooks v. Wimer, 20 Mo. 608	457	Carr v. Northern Liberties, 25 Penn. St. 229	704
Brown, Ex parte, 7 Mo. App. 694	428	Carrigan v. Looming Ins. Co., 20 Vt. 671	671
Brown v. Freeland, 24 Wis. 131	426	Carroll v. Ertheiler, 1 Fed. Rep. 600	164
Brown v. Illinois, 27 Conn. 24	270	Carroll v. N. Y. & New Haven R. Co., 1 Duer, 51	620
Brown v. Kendall, 6 Cush. 222	173	Carroll's State, 3 Humph. 315	67
Brown v. Leavitt, 31 N. Y. 129	407	Carrothers v. Russell, 53 Iowa, 240; 20 Am. Rep. 222	423
Brown v. McGuire, 5 Sandf. 294	418	Carson v. McFarland & Hawley, 112	671
Brown v. Montgomery, 20 N. Y. 229	407	Carter v. Black & Dev. & Bat. 424	726
Brown v. Phelon, 2 Swan, 429	254	Carter v. Jones & Fred. Eq. 196, 197	709
Brown v. Quilter, Amb. 621	264	Carter v. Thurston, 28 N. H. 104	229
Brown v. Randall, 25 Conn. 50; 4 Am. Rep. 25	600	Carter v. Toussaint & B. & A. 425	17
Brown v. Timmamy, 20 Ohio St. 69	300	Carter v. Carle & Bear, 292	169
Brown v. Upton, 12 Ga. 305	29	Chaco Bank v. Keene, 53 Me. 100	704
Brunkild v. Freeman, 77 N. C. 126	644	Caser, Rec. v. Adams, 1	529
Brunswick v. Hovver, Nov. 1890	644	Chabman v. Henry, 75 N. Y. 100; 31 Am. Rep. 627	679
Brunswick v. Litchfield, 2 Greenl. 29	220	Castle v. Sworder, 5 H. & N. 226	17
Brush v. Carpenter, 8 Ind. 74	163, 165	Caswell v. District, 15 Wend. 279	610
Buchanan v. Exchange F. Ins. Co., 81 N. Y. 29	620	Caterham Ry. Co. v. London E., 37 Eng. C. L. 410	734
Buchanan v. Smith, 16 Wall. 200	126	Cathie v. Bourne, 14 Blag. N. C. 614; 8 O. 11 Cl. & Fin. 46	679
Buchout v. Swift, 27 Cal. 426	702	Catlin v. Tobias, 20 N. Y. 217	305
Buel v. N. Y. C. R. Co., 51 N. Y. 214	297	Cayser v. Taylor, 10 Grag. 274	240
Bulford v. Kirkpatrick, 13 Ark. 39	31	Cecil v. Hicks, 20 Gratt. 1; 20 Am. Rep. 291	310
Bulford v. Bank, 10 Wall. 200	246	Cent. Bridge Corp. v. Butler, 2 Gray. 120	149
Bullock v. Hullock, 122 Mass. 8	204	Cent. R. Co. v. Green, 5 Norris, 421	620
Bullock v. Taylor, 20 Mich. 127; 20 Am. Rep. 266	67	Chaboon's Case, 20 Gratt. 723	724
Burbank v. Crocker, 7 Gray, 106	690	Chamberlain v. Smith, 5 Wright, 421	620
Burbank v. Eckhart, 3 Comst. 109	200	Champion v. Beatwick, 18 Wend. 175	611
Burton v. Atkins, 5 Bi. ckl. 237	210	Champion v. Bowley, 13 Wend. 226	504
Burgess v. Southbridge Sav. Bk., 2 Fed. Rep. 220	210	Chamley's Case, 1 P. Wms. 406	557
Burt v. Shain, 2 Bibb, 241	449	Chandler v. Johnson, 20 Ga. 29	94
Burke v. Shannon, 115 Mass. 426	204	Chandler v. Simmons, 27 Mass. 709	416
Burley v. Russell, 10 N. H. 124	412, 414	Chapman v. State, 5 Blackf. 111	697
Burkham v. Brewster, 79 Ill. 615; 25 Am. Rep. 177	143	Chapman v. Lapham, 20 Pick. 497	167
Burnett v. Snyder, 78 N. Y. 244	297	Chapin v. Rogers, 1 East, 126	77
Burnham v. Ayer, 25 N. H. 261	224	Chappell v. Marvin, 2 Aik. 79	26
Burnham v. Firman, 22 Wall. 170	212, 213	Charitable Corporations v. Lutton, 3 Aik. 426	520
Burns v. Bellefontaine & St. L. R. Co., 20 Mo. 229	712	Charles v. Hopkins, 14 Iowa, 471	229
Burr v. Smith, 21 Barb. 229	707	Charles v. People, 1 Comst. 124	204
Burrows v. Erie Ry. Co., 25 N. Y. 229	226	Charles v. Taylor, 2 C. P. D. 426	543
Bush v. Seabury, 3 Johns. 419	279	Chase v. Binger, 10 N. H. 27	674
Bushman v. Ganster, 72 Penn. St. 229	229	Chase v. Denny, Mass. & C. 1461	724
Busteed v. Parsons, 25 Am. Rep. 694	157		
Butler v. Pash, 16 Ohio St. 224	102		

	PAGE.		PAGE.
Chase v. Redding, 13 Gray, 412, 373, 374, 376	376	Clough v. Clough, 117 Mass. 88	378
Chase v. Silverstone, 62 Me. 175; 16 Am. Rep. 410	370	Clew v. Woods, 5 S. & R. 273; 9 Am. Dec. 345	384
Chasemore v. Richards, 1 H. L. Cas. 348, 370	370	Coats v. Holbrook, 2 Sandf. Ch. 500	190
Chestain v. Brown, 31 Ga. 345	71	Cochran v. Nebeker, 48 Ind. 432	231
Chatfield v. Wilson, 28 Vt. 40	370	Coddington v. Bay, 20 Johns. 67	496
Cheek v. State, 26 Ind. 402	87, 88	Codman v. Freeman, 14 Cush. 303	433
Chlam v. Toomer, 27 Ark. 109	203	Coggshall v. Potter, 1 Holmes' C. C. 75	353
Chester v. Dickerson, 54 N. Y. 1; 2 C. 13 Am. Rep. 350	610	Coggill v. Hartford R. Co., 3 Gray, 345	606
Chesterfield Mfg. Co. v. Dehon, 5 Pick. 7; 15 Am. Dec. 57	353	Cogley v. Cushman, 10 Minn. 307	400
Chicago v. Gage, 95 Ill. 503; 36 Am. Rep. 182	385	Cohen v. N. Y. Mut. Life Ins. Co., 50 N. Y. 610, 2 C. 10 Am. Rep. 502	507
Chicago v. Rumsey, 67 Ill. 348	704	Cole v. Berry, 13 Vroom, 305; 20 Am. Rep. 511	608
Chicago & Alton R. Co. v. Randolph, 55 Ill. 513; 5 Am. Rep. 60	386	Cole v. Fox, 83 N. C. 463	604
Chicago City Ry. Co. v. Mumford, 67 Ill. 500	386	Cole v. Hills, 44 N. H. 227	203
C. & R. I. R. R. v. Warren, 16 Ill. 308	373	Colgrove v. Tallman, 67 N. Y. 95, 99; 2 C. 23 Am. Rep. 90	501
Chicago, etc., R. Co. v. Mayor of New-town, 36 N. Y. 200	386	Collins v. Bantern, 2 Will. 341	301, 677
Chicago & N. W. R. R. Co. v. Mayor, 26 Iowa, 200	317	Collins v. Dorchester, 6 Cush. 303	630
Chick v. Willetta, 2 Kans. 235	376	Col. Silver Min. Co. v. Virginia and Gold Hill Water Co., 1 Sawy. 470	273
Childs v. Dolan, 5 Allen, 319	600	Colt v. Ives, 31 Conn. 25	353
Christmas v. Russell, 5 Wall. 200	32	Colton v. Richards, 123 Mass. 464	346
Christian v. Crocker, 26 Ark. 307	610	Columbus and Ind. Ry. Co. v. Farrell, 31 Ind. 408	756
Chrysler v. Renolds, 43 N. Y. 200	400	Combe & case, 5 Coke 135	630
Church v. Knox, 2 Conn. 514	341	Comer v. Cunningham, 75 N. Y. 301; 23 Am. Rep. 623	606
City of Alton v. Hope, 88 Ill. 167	775	Com. Back v. Wilkins, 9 Greenl. 28	230
City of Atchison v. Chaille, 9 Kans. 604	764	Com. Bank of Lake Erie v. Norton, 1 Hall 91	36
City of Aurora v. Gillett, 56 Ill. 122	774	Com. v. Carter, 2 Kans. 115	350
City of Aurora v. Reed, 57 Ill. 30; 11 Am. Rep. 1	774	Commonwealth v. Daley, 4 Gray, 300	149
City of Bangor v. Lausit, 51 Me. 321	700	Commonwealth v. E. & N. E. R. Co., 27 Penn. St. 314	319
City of Bloomington v. Brokaw, 77 Ill. 104	703	Commonwealth v. Erie, etc., R. Co., 27 Penn. St. 530	326
City of Bridgeport v. Houstonie R. Co., 15 Conn. 475	300	Commonwealth v. Green, 17 Mass. 530	764
City of Brooklyn v. Breall, 57 N. Y. 501	500	Commonwealth v. Hall, 11 Cush. 137	674
City of Chicago v. Gage, 95 Ill. 503; 35 Am. Rep. 182	385	Commonwealth v. Kendall, 113 Mass. 210	361
City of Clinton v. Cedar Rapids & M. R. Co., 24 Iowa, 455	221, 226	Commonwealth v. Lane, 113 Mass. 436; 18 Am. Rep. 509	324
City of Elgin v. Eaton, 63 Ill. 525	703	Commonwealth v. Mead, 13 Gray, 167	674
City of Logansport v. Wright, 26 Ind. 513	773	Commonwealth v. Morrell, 20 Mass. 542	390
City of Mt. Pleasant v. Bruce, 11 Iowa, 309	310	Commonwealth v. Mullis, 2 Allen, 273	390
City of Pekin v. Brereton, 67 Ill. 477; 16 Am. Rep. 620	782	Commonwealth v. Nantredo, 25 Penn. St. 289	340
City of Pekin v. Newell, 26 Ill. 300	310	Commonwealth v. Ramsdell, Sup. Ct. Mass. 25 A. L. J. 414	304
City of Shawneetown v. Mason, 82 Ill. 330	703	Condit v. G. T. R. R. Co., 51 N. Y. 500	500
Clark v. Houseman, 90 U. S. 120	513	Congregational Soc. v. Fleming, 11 Iowa, 543	700
Clark v. Baker, 5 Metc. 402	357	Congress Spring Co. v. High Rock Spring Co., 45 N. Y. 291, 2 C. 6 Am. Rep. 82	502
Clark v. Brown, 16 Wend. 230	780	Corn v. Eastman, 1 Cush. 180	543
Clark v. Clark, 8 Cush. 385	324	Corn v. Jackson, 1 Johns. Ch. 13; 1 Am. Dec. 421	311
Clark v. Eighth Ave. R. Co., 32 Barb. 657; 26 N. Y. 123	713	Corn v. L. S. Co. v. N. Y., etc., R. Co., 25 Conn. 2	710
Clark v. Gilbert, 26 N. Y. 279	503	Corn v. R. R. R. Co., 1 Johns. Cas. 127	413
Clark v. Graham, 5 Wheat. 577	322	Confidential Nat. Bank v. Elliot Nat. Bank, 1 S. C. R. Ct. Mass.	353
Clark v. Jack, 7 Watts, 375	600	Corway v. Belfast, etc., Ry. Co., 11 Irish C. L. 31	484, 620
Clark v. Wells, 45 Vt. 4	600	Corway v. Smith, 11 Wis. 125	518
Clark v. Wilmington, 5 Harr. 343	704	Coyers v. State, 50 Ga. 103; 15 Am. Rep. 186	147
Clarke v. Bogardus, 13 Wend. 67	557	Cook v. E. W. R. R. & H. L. R.	307
Clarke v. Gordon, 3 Rich. 313	735	Cook v. State, 60 Ala. 30; 34 Am. Rep. 31	643
Clayton v. Livermore, 2 Dev. & Bat. 570	5	Cook v. City of Burlington, 35 Iowa, 357	221
Cliff v. Midland R. Co., L. R., 5 Q. B. 51	444	Cooke v. M. J. R., 65 N. Y. 302; 22 Am. Rep. 19	38
Clifford v. Parker, 2 M. & G. 909	302	Cooke v. State Nat. Bank, 63 N. Y. 96; 2 C. 11 Am. Rep. 609	510
Clinton v. Cedar Rapids & M. R. Co., 24 Iowa, 455	221, 226		
Clothier v. Adrianca, 51 N. Y. 322	497		
Cloud v. Hartridge, 28 Ga. 373	71		

TABLE OF CASES CITED.

xix

PAGE.	PAGE.		
<i>Cochran v. New Bedford Cordage Co.</i> , 22 Mass. 512; 8 Am. Rep. 509.....	540	<i>Davis v. Hudson River R. Co.</i> , 7 Barb. 509.....	226
<i>Coe v. S. & M. R. R. Co.</i> , 6 Barb. 281; 1 N. Y. 422.....	402	<i>Davis v. Jenney</i> , 1 Metc. 281.....	220
<i>Coeper v. State</i> , 5 Tex. Ct. App. 315; 25 Am. Rep. 371.....	432	<i>Davis v. Landall</i> , 3 R. I. 629.....	196
<i>Cortese v. Doll</i> , 25 Cal. 38.....	510	<i>Davis v. Mayor</i> , 14 N. Y. 500.....	319
<i>Cortese v. Holbrook</i> , 58 N. Y. 519; 2 C. T. Am. Rep. 379.....	488	<i>Davis v. Ney</i> , 135 Mass. 500; 25 Am. Rep. 373.....	376
<i>Cornth v. Lincoln</i> , 34 Me. 510.....	58	<i>Davis v. West</i> , 12 Ves. 475.....	600
<i>Cottee v. Cumming</i> , 5 Cal. 141.....	364	<i>Day v. Brooklyn, etc.</i> , R. Co., 13 Hun. 425.....	712
<i>Cornack v. Richards</i> , 3 Lea. 1.....	384	<i>Day v. Crawford</i> , 13 Ga. 505.....	71
<i>Cornel v. Nebecker</i> , 58 Ind. 405.....	150	<i>Day v. Saunders</i> , 1 Abb. Ct. App. Dec. 465.....	406
<i>Coring v. Coll</i> , 5 Wend. 223.....	605	<i>Dayton v. Borst</i> , 31 N. Y. 437.....	314
<i>Cotton v. Widdoughby</i> , 42 N. C. 75; 35 Am. Rep. 554.....	728	<i>Dayton v. Walsh</i> , 47 Wis. 113; 39 Am. Rep. 757.....	321
<i>Cotton v. Frankford & Southwark Ry. Co.</i> , Penn. 384.....	384	<i>Deal v. Bogue</i> , 30 Penn. St. 223.....	341
<i>Covington R. Ry. Co. v. Packer</i> , 9 Bush. 430; 13 Am. Rep. 725.....	718	<i>Dearle v. Hall</i> , 3 Russ. 1.....	355
<i>Cox v. Hickman</i> , 8 H. of L. Cas. 301.....	530	<i>Deering v. Doyle</i> , 8 Kans. 525; 13 Am. Rep. 480.....	608
<i>Cox v. Palmer</i> , Minn. 264.....	264	<i>De Forest v. Tolman</i> , 117 Mass. 100; 10 Am. Rep. 400.....	180
<i>Craig v. Clark</i> , 7 Shop. 397.....	201	<i>De Gruff v. Wilson</i> , 30 N. J. Bq. 465.....	250
<i>Craig v. Turner's Adm'rs</i> , 6 Leigh. 115.....	295	<i>D'Invernous v. Leavitt</i> , 23 Barb. 60.....	702
<i>Cramer's case</i> , 2 Balk. 505.....	367	<i>De la Chaumette v. Bank of England</i> , 2 B. & Ad. 385.....	236
<i>Cramer v. Goss</i> , 107 Mass. 440; 9 Am. Rep. 45.....	312	<i>Delaplaine v. Cbl. & N. W. Ry. Co.</i> , 48 Wis. 214; 24 Am. Rep. 386.....	401
<i>Crawford v. King</i> , 54 Ind. 8.....	168	<i>Delhi v. Youmans</i> , 45 N. Y. 338; 4 Am. Rep. 100.....	273
<i>Crawford v. Stetson</i> , 51 Ga. 121.....	71	<i>Dellner v. Cawthorne</i> , 2 Dev. 90.....	606
<i>Crawford v. Word</i> , 7 Ga. 445.....	232	<i>Demick v. Cent. R. Co. of N. J.</i> , 100 U. S. 11.....	161
<i>Cramer v. Shannon</i> , 17 Ga. 65.....	71	<i>Denny v. Cabot</i> , 5 Men. 82.....	610
<i>Cred v. Pennsylvania R. R. Co.</i> , 5 Morris. 120, 129.....	600, 700	<i>Derry v. Mattoon</i> , 2 Allen. 211.....	306
<i>Cripe v. Hartnoll</i> , 4 B. & S. 414.....	184	<i>Dentzel v. Waddle</i> , 70 Cal. 138.....	308
<i>Crispy v. Hestonville, etc.</i> , R. Co., 75 Penn. 34, 39.....	712	<i>De Peyster v. Michael</i> , 6 N. Y. 467.....	207
<i>Croft v. Lemley</i> , 8 H. L. C. 672.....	147	<i>Depe v. Chic. Rock Island & Pacific R. Co.</i> , 36 Iowa. 52.....	100
<i>Cromwell v. Co. of Ser.</i> , 90 U. S. 51.....	513	<i>Derringer v. Plate</i> , 29 Cal. 203.....	165
<i>Crosby v. Jeroloman</i> , 37 Ind. 264.....	180	<i>Detroit & Michigan R. R. v. Steenberg</i> , 17 Mich. 90.....	710
<i>Crum v. Gushery</i> , 2 Hoot. 90; 1 Am. Dec. 61.....	712	<i>Dewitt v. Walton & Seld</i> , 571.....	600
<i>Crow v. R. R. Co.</i> , 32 Tex. 302.....	701	<i>De Wolf v. Raband</i> , 1 Pet. 476.....	103
<i>Crowley v. Panama R. Co.</i> , 30 Barb. 99.....	100	<i>Dexter v. Norton</i> , 47 N. Y. 63; 2 C. C. 7 Am. Rep. 415.....	607
<i>Crowther v. Appleby</i> , L. R. 9 O. P. 22.....	428	<i>Dexter v. Providence Aqueduct Co.</i> , 1 Story. 397.....	273
<i>Crotchfield's case</i> , 75 N. C. 300.....	605	<i>Dickinson v. Canal Co.</i> , 7 Exch. 230.....	271
<i>Culhane v. N. Y. C. & H. R. R. Co.</i> , 60 N. Y. 120.....	444	<i>Dickinson v. Cent. Nat. Bank</i> , 130 Mass. 279.....	355
<i>Culver v. Benedict</i> , 13 Gray. 7.....	397	<i>Dickinson v. Colter</i> , 45 Ind. 445.....	107
<i>Cumby v. Wane</i> , 18 Smith's Lead. Cases. 42.....	400	<i>Dickinson v. Edwards</i> , 71 N. J. 573; 2 C. C. 39 Am. Rep. 371.....	322
<i>Cummings v. Parks</i> , 2 Ind. 140.....	147	<i>Dickinson v. Worcester</i> , 7 Allen. 19.....	240
<i>Curtis v. Brown</i> , 20 Ill. 201.....	122	<i>Dix v. Cobb</i> , 4 Mass. 508.....	254
<i>Curtis v. D. L. & W. R. Co.</i> , 74 N. Y. 116; 2 C. C. 30 Am. Rep. 271.....	579	<i>Dobson v. Pearce</i> , 12 N. Y. (2 Kern) 154.....	54
<i>Curtis v. Gekoy</i> , 68 N. Y. 304.....	534	<i>Dobson v. Sotheby</i> , M. & M. 93.....	649
<i>Cusack v. Robinson</i> , 1 B. & S. 200.....	19	<i>Doddridge Co. v. Stout</i> , 9 W. Va. 708.....	784
<i>Cutler v. Davenport</i> , 1 Pick. 31.....	281	<i>Dodson v. Harris</i> , 10 Ala. 568.....	600, 611
<i>Cutler v. State</i> , 1 Vroom. 125.....	47	<i>Doe v. Catomora</i> , 18 Ad. & Ell. (N. S.) 745.....	303
<i>Cutler v. Wright</i> , 25 N. Y. 473.....	505	<i>Doe v. Johnson</i> , 7 M. & G. 1047.....	140
<i>Cutting v. Seabury</i> , 1 Sprague's Dec. 60.....	712	<i>Doe v. Howlands</i> , 9 C. & P. 734.....	147
		<i>Doe v. Vardill</i> , 2 Cl. & Fin. 571; 7 Id. 605.....	321, 322, 323, 325
<i>Dale v. Metcalf</i> , 9 Penn. St. 103.....	200	<i>Doe v. Warren</i> , 7 Greenl. 48.....	319
<i>Daley v. Corney</i> , 117 Mass. 204.....	370	<i>Dole v. Young</i> , 24 Pick. 150.....	147
<i>Dalbousie v. McDonall</i> , 7 Cl. & Fin. 397.....	397	<i>Donaldson v. Farwell</i> , 90 U. S. 681.....	250
<i>Dalrymple v. Dalrymple</i> , 2 Hagg. Consider. 54, 59, 61.....	323, 329	<i>Donaldson v. Misa, etc.</i> , R. Co., 13 Iowa. 720.....	718
<i>Daly v. Maitland</i> , 7 Norris. 384.....	670	<i>Doner v. Stauffer</i> , 1 Penn. 190.....	241
<i>Dambman v. Schulting</i> , 75 N. Y. 55.....	437	<i>Donnell v. Harsha</i> , 57 Mo. 170.....	610
<i>Damont v. New Orleans & Carrollton Ry. Co.</i> , 9 La. Ann. 441.....	395	<i>Donville v. Merrick</i> , 35 Wis. 605.....	304
<i>Daniel v. Daniel</i> , Ind. 230.....	205	<i>Doolittle v. Lewis</i> , 7 Johns. Ch. 40; 11 Am. Dec. 339.....	741
<i>Darling v. City of Baltimore</i> , 51 Md. 1.....	74	<i>Dorr v. Fisher</i> , 1 Cush. 271.....	148
<i>Davis v. Barrington</i> , 10 N. H. 517.....	344	<i>Doss v. M. R. & L. R.</i> , 69 Mo. 27; 31 Am. Rep. 371.....	205
<i>Davis v. Carlsale</i> , 6 Ala. (N. S.) 707.....	322		
<i>Davis v. Gray</i> , 14 Wall. 229.....	300		
<i>Davis v. Holding</i> , 1 M. & W. 159.....	204		

TABLE OF CASES CITED.

PAGE.	PAGE.		
Dover v. Trembly, 42 N. H. 68.	689	Elliott v. Flashburg B. Co., 79 Oash. 271.	574
Dowale v. Hendrix, Mich. Sup. Ct., Oct., 1904.	711	Elliott v. Gower, 18 N. Y. 19; 34 Am. Rep. 439.	617
Dougherty v. Chicago, etc., N. O., 68 Ill. 487.	598	Elliott v. Health, 14 N. H. 231.	644
Douglas v. Chapin, 30 Conn. 78.	80	Elliott v. Pray, 10 Allen, 379.	590
Douglas v. Page, 8 Leigh, 601, 602. 795.	797	Ellis v. Duncan, 21 Barb. 280.	570
Douglas v. Russell, 3 Jur. 513; 1 Myl. & K. 449.	628	Ellis v. Francis, 9 Ga. 27.	30
Douglas v. Winslow, 20 Me. 89.	699	Ellis v. Iowa City, 29 Iowa, 289.	710
Dow v. Updike, Iowa Sup. Ct., Jan., 1881.	677	Ellis v. Maxson, 19 Mich. 229; 8 O., 3 Am. Rep. 31.	685
Dowell v. Dow I Y & C N C 288.	651	Elison v. Winchert, 20 Ind. 28.	599
Downey v. Hinchman, 25 Ind. 445.	598	Elmendorf v. Taylor, 10 Wheat. 220.	600
Drake v. Piewellen, 25 Ala. 105.	597	Elmore v. Stone, 1 Tanst. 457.	57
Drumham v. Hunting 9 Ind. 10.	610	Emmanuel v. Draughn, 14 Ala. 308.	611
Drury v. Hunt, 3 Ind. 47.	598	Emerson v. Slater, 20 How. 36.	543
Dry v. Dowell 14 Ind. 229.	610	Empire Transportation Co. v. Wamsutter Oil Co., 29 P. F. Smith, 14; 8 Am. Rep. 515.	710
Dubois v. Baker 31 N. Y. 215.	648	Enlow v. Klen, 29 P. F. Smith, 458.	641
Dudley v. Abner 12 Ala. 573.	607		609, 675
Duncan v. Jaudan, 15 Wall 145.	607	Enos v. Tuttle, 8 Conn. 27.	60
Duffield v. Kenna, 1 High N. H. 497.	573	Eschendorf v. Brooklyn City, etc., N. Co., 69 N. Y. 105, 20 Am. Rep. 171.	596
Duffield v. Hicks 11 W. & C. 1.	573	Eringer v. Stevens, 61 Ill. 84.	0
Duffy v. Upton 113 Mass. 744.	649	Essex County Bank v. Russell, 20 N. Y. 673.	608
Dugan v. Nichols, 17 Mass. 43.	598	Estes v. McDaniel, 23 Ill. 201.	610
Dugan v. Mitchell & E. R. 11 Casey, 649.	709	Evans v. Beattie, 8 Rep. 36.	526
Duke v. Oshawa Nav. Co., 10 Ala. 68.	554	Evans v. Dravo, 18 Harris, 47.	679
Duke of Gloucester v. Metropolitan Board of Works, L. R., 8 H. L. 639.	601	Evans v. Mengel, 8 Watts, 73; 1 Barr. 68.	710
Dulaney v. Tilgham, 6 O. & J. 481.	600	Evans v. Harriweather, 3 Scam. 436.	500
Dunbar v. Rawlin, 20 Ind. 289.	600	Evans v. U. S. Life Ins. Co., 64 N. Y. 204.	607
Dunham v. Pettes, 4 Sald. 308.	51	Evansville, etc., N. Co. v. Cochran, 10 Ind. 240.	578
Dunlap v. Cody, 21 Iowa, 289; 7 Am. Rep. 129.	60	Hyre v. McDonald, 9 H. L. 619.	605
Dunn v. English, 10 Musk. 545.	648	Eyton v. Stodd, 3 Plow. 425.	549
Dunn v. Grand Trunk Ry. Co., 20 Me. 107; 4 Am. Rep. 107.	657	Fairfield v. County of Gallatin, 100 U. S. 47.	570
Dunn v. Hewitt, 2 Den. 687.	641	Fales v. Russell, 10 Pick. 215.	575
Dunn v. Northern Missouri R., 24 Mo. 689.	509	Falkenburg v. Lury, 20 Cal. 62.	596
Dunster v. Lord Glenall, 3 Ir. Ch. 47.	595	Fall River Iron Works v. Orande, 13 Pick. 11.	601
Duran v. Ayer, 67 Me. 146.	513	Farewell v. Dickenson, 6 B. & C. 231.	593
Durgis v. Munson, 8 Allen, 288.	549	Farmers & Merchants' Bk. v. Chemplain Trans. Co., 26 Vt. 219.	43
Dutton v. Strong, 1 Black, 29.	601	Farias v. Horne, 16 M. & W. 119.	51
Duvall v. Craig, 3 Wheat. 48.	602	Farnsworth v. Boston, 120 Mass. 1.	615
Dwight v. County Com'rs, etc., 11 Conn. 304.	1	Farnsworth v. Sharp, 4 Sneed, 25.	594
Dwight v. Whitney, 15 Pick. 170.	607	Farewell v. B. & W. R. Co., 4 Noto. 64.	525
Dyball v. Stone, 20 Me. 284.	610		544, 545
Dygert v. Schenck, 28 Wend. 448.	572	Faulkner v. Wilson, 3 W. N. C. 589.	676
		Pay v. Edmiston, 25 Kans. 439.	528
Eadie v. Stimson, 20 N. Y. 9.	600	Pay v. Holloran, 20 Barb. 265.	598
Earl of Palmouth v. Moss, 11 Price, 465.	465	Feltham v. England, L. R., 2 Q. B. 22.	545
Earl of Sandwich v. Gt. U. F. Co., L. R., 10 Ch. D. 707.	594	Fenton v. Clark, 11 Vt. 540.	614
East India Co. v. Paul, 1 Eng. L. & Eq. 44, 46.	671	Fenton v. Goadry, 13 East, 673.	529
East Saginaw City R. Co. v. Baker, 27 Mich. 228.	713	Fenton v. Livingston, 8 Marq. 457.	531
Eastwood v. Kenyon, 11 A. & B. 408.	598	Ferguson v. Ross, 5 Ark. 517.	51
Eaton v. Benton, 9 Ill. 679.	607	Ferrall v. McMillan, 7 W. Va. 289.	706
Eaton v. Bolmonauk, 67 Ill. 640; 24 Am. Rep. 32.	513	Ferris v. Adams, 26 Vt. 239.	504
Eaton v. Erie R. Co., 51 N. Y. 644.	444	Ferry v. Ferry, 3 Oash. 62.	601
Eaton v. R. Co., 51 N. H. 694; 13 Am. Rep. 147.	710	Fery v. Pfeiffer, 10 Wis. 610.	601
Eaton v. Lexington & F. R. Co., 16 B. Monr. 304.	717	Fiebler v. Collier, 13 Ga. 459.	71
Eaton v. Canady, 60 Ga. 458.	599	Fiefield v. Ebner, 25 Mich. 69.	606
Edgar v. Shields, 1 Grant, 201.	671	Filer v. N. Y. C. & H. Co., 49 N. Y. 47; 10 Am. Rep. 227.	595
Edwards v. Mitchell, 1 Gray, 229.	601	Filley v. Farnett, 44 Mo. 173.	595
Edwards v. De Mill, 25 N. Y. 670.	600	Pilson v. Hines, 6 Barr. 459.	600
Edenford v. Snyder, 11 N. Y. 45.	619	Pinn v. Donahue, 25 Conn. 216.	512
Elbert v. McClelland, 8 Bush, 677.	598	Finney's Appeal, 60 Penn. St. 228.	554
Elgin v. Eaton, 20 Ill. 643.	708	First Nat. Bank v. Franklin, 20 Kans. 284.	597
Eliton v. Newman, 20 Penn. St. 223.	708	First Nat. Bank v. Ocean Nat. Bank, 68 N. Y. 273; 8 C. 10 Am. Rep. 121.	549
Elkin v. Johnson, 19 M. & W. 628.	549	First Nat. Bank of Lawrenceburg v. Lotton, 67 Ind. 226.	598
		First Nat. Bank of New Windsor v. Rynum, ante.	677

TABLE OF CASES CITED.

XXI

	PAGE.		PAGE.
<i>Faber v. Essex Bank</i> , 5 Gray, 373...351, 355		<i>Gelpcke v. Dubuque</i> , 1 Wall. 173, 203... 351	
<i>Faber v. Pender</i> , 7 Jones, 495..... 355		<i>Georgia R. Co. v. McCurdy</i> , 45 Ga. 205; 15 Am. Rep. 577..... 355	
<i>Fake v. Edridge</i> , 12 Gray, 478..... 148		<i>Germantown Pass. R. Co. v. Walling</i> , Pennsylvania Supreme Court, January, 1861..... 711	
<i>Fick v. Redding</i> , 4 Sandf. 129..... 370		<i>Gibson v. Hibbard</i> , 15 Mich. 214..... 355	
<i>Fitz v. Hall</i> , 9 N. H. 441..... 414		<i>Gibson v. Pacific Ry. Co.</i> , 48 Mo. 149; 8 C. 2 Am. Rep. 497..... 355	
<i>Fitzgerald v. Dressler</i> , 7 C. B. (N. S.) 374. 155		<i>Gibson v. Stevens</i> , 7 N. H. 302..... 355	
<i>Fitzwater Peasage case</i> , 10 Cl. & Fin. 108..... 545		<i>Giddings v. L. Ins. Co., U. S.</i> 355	
<i>Flem v. Nicholls</i> , 2 M. G. & A. 601..... 511		<i>Gill v. Continental Ins. Co., L. R.</i> , 7 Ex. 619..... 355	
<i>Flegg v. Worcester</i> , 12 Gray, 601... 91, 704		<i>Gillett v. Sweet</i> , 6 Ill. 475..... 351	
<i>Finnagan v. Demarest</i> , 3 Robt. 173..... 355		<i>Gillett v. Esterbrook</i> , 48 N. H. 374; 8 C. 2 Am. Rep. 553..... 354, 355, 355	
<i>Fleeman v. McKean</i> , 25 Barb. 474..... 355		<i>Gilman v. Eastern R. R.</i> , 10 Allen, 303. 355	
<i>Fletcher v. Hightower</i> , Ga..... 74		<i>Gilman v. Hall</i> , 11 Vt. 610..... 354	
<i>Filke v. B. & A. R. Co.</i> , 55 N. Y. 549; 2 C. 2 Am. Rep. 545..... 355		<i>Gilman v. Hunnewell</i> , 122 Mass. 129..... 354	
<i>Flower v. R. B. Co.</i> , 60 Penn. St. 216; 3 Am. Rep. 251..... 355		<i>Gilman v. Phila.</i> , 3 Wall. 713..... 405	
<i>Fontaine v. Gunter</i> , 31 Ala. 299..... 355		<i>Gilmore v. Wilbur</i> , 16 Pick. 517..... 149	
<i>Ford v. Fitchburg R. R.</i> , 110 Mass. 340; 14 Am. Rep. 329..... 345, 349		<i>Gilshannon v. Stony Brook R. R.</i> , 10 Cush. 224..... 345	
<i>Ford v. Monroe</i> , 30 Wend. 310..... 714, 719		<i>Gilson v. Spear</i> , 34 Vt. 311..... 413	
<i>Ford v. Stuart</i> , 19 Johns. 345..... 372		<i>Gillman v. Strong</i> , 64 Penn. St. 245..... 355	
<i>Forsyth v. Bots</i> , 6 Bush..... 704		<i>Ginn v. Second Ave.</i> , 67 N. Y. 699. 713	
<i>Foss v. Lowell Five Cents Sav. Bank</i> , 111 Mass. 255..... 371		<i>Glass v. Hulbert</i> , 102 Mass. 34; 3 Am. Rep. 418..... 351	
<i>Foster v. Cockrell</i> , 3 C. L. & Fin. 485..... 355		<i>Glasey v. R. R. Co.</i> , 51 F. Smith, 173. 706	
<i>Foster v. Mackay</i> , 7 Metc. 591..... 379		<i>Glen & Hall Mfg. Co. v. Hall</i> , 61 N. Y. 226; 10 Am. Rep. 278..... 355	
<i>Foster v. Poyser</i> , 9 Cush. 343..... 355		<i>Goddard v. Webster</i> , 8 Me. 437..... 709	
<i>Foster v. Ropes</i> , 111 Mass. 10..... 370		<i>Goddard v. Sawyer</i> , 9 Allen, 73..... 355	
<i>Foster v. Waterman</i> , 124 Mass. 592..... 340		<i>Gold v. Eddy</i> , 1 Mass. 1..... 351	
<i>Fowler v. Fowler</i> , 8 P. Wms. 398..... 545		<i>Gouldrick v. Bristol Co. Sav. Bk.</i> , 123 Mass. 320..... 374	
<i>Fox v. Drake</i> , 8 Cow. 191..... 143		<i>Gouch v. Bryant</i> , 1 Shep. 309..... 351	
<i>Fox v. Reil</i> , 3 Johns. 479..... 355		<i>Goodell v. Fairbrother</i> , 12 R. L. 299; 34 Am. Rep. 631..... 355	
<i>Frane v. Dawson</i> , 14 Ves. Jr. 295..... 351		<i>Goodenow v. Tyler</i> , 7 Mass. 26; 5 Am. Dec. 22..... 355	
<i>Franklin v. Flake</i> , 13 Allen, 371..... 708		<i>Goodloe v. Taylor</i> , 3 Hawks. 426..... 405	
<i>Franklin v. Long</i> , 7 G. & J. 477..... 31		<i>Gordon v. Clapp</i> , 113 Mass. 329..... 149	
<i>Franklin Ins. Co. v. Chicago Ice Co.</i> , 30 Md. 122; 11 Am. Rep. 469..... 349		<i>Gordon v. Lewis</i> , 2 Sum. 163..... 194	
<i>Frandon v. Chic.</i> , Rock Island & Pacific R. Co. 28 Iowa, 373..... 100		<i>Gordon v. Ward</i> , 16 Mch. 343..... 354	
<i>Frab v. Polk</i> , 67 Ind. 15..... 167		<i>Gordulo v. Wegnehn</i> , 5 Ch. D. 297..... 355	
<i>Fraser v. Charleston</i> , 1 S. C. 436..... 354		<i>Gorham Co. v. White</i> , 16 Wall. 611..... 355	
<i>Fraser v. Brown</i> , 15 Ohio St. 294..... 370		<i>Goshen v. Stonington</i> , 4 Conn. 309; 10 Am. Dec. 121..... 355	
<i>Freeman v. Auld</i> , 44 N. Y. 59..... 473		<i>Goss v. Coffin</i> , 46 Me. 412; 30 Am. Rep. 765..... 355	
<i>Freemover v. Richmond</i> , 31 Gratt. 646; 31 Am. Rep. 744..... 64		<i>Goss v. Watlington</i> , 3 Brod. & B. 129..... 355	
<i>Freesebarger v. Henry</i> , 6 Jones, 545..... 355		<i>Gottal v. Rose</i> , 17 C. B. 31..... 31	
<i>Frost v. Houston</i> , 31 Beav. 399..... 351		<i>Gouge v. Roberts</i> , 51 N. Y. 519..... 355	
<i>Fudicker v. Guardian Mutual Ins. Co.</i> , 65 N. Y. 299..... 349		<i>Gould v. Simonsen</i> , 32 4d. Pr. 474..... 30	
<i>Funcheson v. Harvey</i> , 119 Mass. 449..... 149		<i>Governor v. Sullivan</i> , 4 Dev. & Nat. 404..... 355	
<i>Furneaux v. Hutchins</i> , Cowp. 307..... 355		<i>Grading v. Cowgill</i> , 12 F. wa. 643..... 126	
<i>Furrier v. Mance</i> , 4 La. 639..... 357		<i>Grady v. South</i> , 2 W. Bl. 347..... 355	
		<i>Graham v. Graham</i> , 1 Ves. Sr. 399..... 357	
<i>Gaff v. Shma</i> , 45 Ind. 292..... 167		<i>Grand Junction Canal Co. v. Shegar</i> , 8 Ch. App. Cas. 487..... 373	
<i>Gage v. City of Chicago</i> , 2 Dredw. 399. 323		<i>Grand Rapids & Ind. R. Co. v. Heinzl</i> , 38 Mich. 62; 31 Am. Rep. 300..... 355	
<i>Gahagan v. Boston & Lowell R. Co.</i> , 1 Allen, 157..... 711		<i>Granger v. Clark</i> , 22 Me. 124..... 35	
<i>Gaines v. Manney</i> , 3 Green, 251..... 357		<i>Granite Bk. v. Ayers</i> , 10 Pick. 393..... 307	
<i>Galea & Chicago R. Co. v. Fay</i> , 16 Ill. 529..... 745		<i>Grant v. Allen</i> , 11 Allen, 156..... 708	
<i>Gallagher v. Piper</i> , 16 C. B. (N. S.) 699. 345		<i>Grant v. Howard Ins. Co.</i> , 5 Hall, 10..... 349	
<i>Ganshl v. Shore</i> , 24 Ga. 17..... 71		<i>Graves v. Bohan</i> , 6 N. Y. 499..... 253	
<i>Garnett v. Harpagon</i> , 10 Allen, 311..... 708		<i>Graves v. H. A. N. Y. St. Co.</i> , 25 Conn. 143; 3 C. 9 Am. Rep. 349..... 379	
<i>Gardner v. McIlwen</i> , 19 N. Y. 126..... 355		<i>Graves v. Legg</i> , 2 H. & N. 210..... 355	
<i>Gardner v. Newburgh</i> , 3 Johns. Ch. 109; 7 Am. Dec. 338..... 374		<i>Gray v. Briscoe</i> , 6 Bush. 657..... 314	
<i>Gerland v. Salem Bank</i> , 9 Mass. 405..... 355		<i>Gray v. Gardner</i> , 17 Mass. 139..... 149	
<i>Garrelle v. Alexander</i> , 4 Esp. Cas. 37..... 344		<i>Gray v. Jackson</i> , 31 N. H. 9; 2 C. 12 Am. Rep. 1..... 373	
<i>Garrett v. Coater</i> , 6 Wright, 143..... 704		<i>Gt. West Ry. Co. v. Braid</i> , 1 Moore, F. C. (N. S.) 101..... 749	
<i>Garrett v. Manchester & Lawrence R. Co.</i> , 16 Gray, 391..... 355		<i>Gt. West. R. Co. v. Miller</i> , 19 Mich. 305. 189	
<i>Garwood v. N. Y. C. & H. R. R. Co.</i> , 35 N. Y. 429, 439; 23 A. L. J. 215. 359, 374			
<i>Gavett v. Manchester & Lawrence R. R.</i> , 16 Gray, 391..... 355			
<i>Gaynor v. Old Colony, etc., Ry. Co.</i> , 300 Mass. 311..... 704			
<i>Geach v. Insall</i> , 14 M. & W. 95..... 149			

	PAGE.		PAGE.
Greaves v. Hayward, 3 High. 204	204	Hasbrouck v. City of Milwaukee, 12 Wis.	200
Greaves v. Hunter, 2 O. & P. 677	677	Hatch v. Attleborough, 97 Mass. 625	625
Grealey v. Maine Cent. R. Co., 95 Me.	704	Hathaway v. Moran, 44 Me. 67	67
Green v. Brookline, 21 Mich. 46; 9 Am.	206	Haverhill Mut. F. Ins. Co. v. Newhall,	143
Rep. 74	206	1 Allen, 120	143
Green v. Clark, 3 Kern. 243	243	Hawkins v. Hawkins Adm'r, 20 Ind. 61	61
Green v. Cromwell, 10 A. & R. 452, 104	104	Hawkins v. State, 1 Port. 173	173
	104	Hawley v. Lyton, 102 U. S. 514	514
Green v. Gouge, 7 Barb. 600	706	Hayden's case, 9 Yerg. 208	208
Green v. Greenbank, 20 Marsh. (Eng.)	416	Hayden v. Goodnow, 20 Conn. 104, 208	208
416	416	Haynes v. Knowles, 20 Mich. 407	407
Green v. Hudson R. R. Co., 9 Kaye,	716	Haynes v. Huddell, 24 N. Y. 251	251
254	716	Hays v. Crutcher, 54 Ind. 200	200
Green v. Marriam, 24 Vt. 201	19	Hays v. Ward & Johns. Ch. 120	707
Green v. Phillips, 20 Gratt. 708	708	Head v. Goodwin 37 Me. 187	187
Greenleaf v. Francis, 15 Pick. 117	117	Healy v. Gilman 1 Bosw. 205	670
Greenwood v. Curtis, 6 Mass. 226; 4 Am.	226	Heart v. Rhodes, 25 Ill. 261	261
Dec. 145	226	Heston v. Hindes, 12 Penn. St. 204	701
Gregory v. Leigh, 20 Tex. 212	142	Heffren v. Dawson, 22 Ill. 40	704
Grover v. Grover, 24 Pick. 251	273	Heffner v. Wenrich, 22 Penn. St. 450	207
Gupton v. Gupton, 47 Mo. 47	408	Henneman v. Heard 22 N. Y. 448	148
Gulhrts v. Jones, 120 Mass. 101	478	Hemans v. Bentley 22 Mich. 91	407
Guy v. Franklin, 6 Cal. 416	217	Hemphill v. McIlmarn, 12 Harris, 207	207
		Henderson v. Moore, 5 Cr. 11	701
Hack v. Lindermann, 14 P. F. Smith,	600	Hendrickson v. Evans, 1 Casey, 441	670
400; 3 Am. Rep. 612	600	Henry v. Bishop, 2 Wend. 675	675
Hager v. Mica, 4 Col. 20; 24 Am. Rep.	148	Henry v. Patterson 7 P. F. Smith, 246	671
6	148	Henry v. Ter & Ash R., 17 Ohio, 187	108
Haggerty v. Palmer, 6 Johns. Ch. 497	600	Herkman v. Swartz 20 Wis. 207	207
Haines v. Lewis, note, 208	677	Herman v. Dickinson, 5 Bing. 120	202
Hale v. Smith, 73 N. Y. 400	147	Herrick v. Mall, 22 Wend. 225	202
Hale v. Webb, 20 Mo. 408	408	Herring v. Pollard & Humph. 208	600
Hall v. Carey, 5 Ga. 200	71	Hersey v. Elliot 27 Me. 607	607
Hall v. Hill, 1 Dr. & War. 94	607	Hershey v. Welting, 14 Wright, 209	670
Hall v. Hinchley, 24 Wis. 200	602	Heryford v. Davis, 102 U. S. 206	602
Hall v. Ins. Co., 58 N. Y. 208; 17 Am.	600	Heydon's case 3 Rep. 7	200
Rep. 255	600	Hickey v. Boston, & Lowell R., 14 Allen,	620
Hall v. Johnson, 3 N. & C. 200	200	129	600
Hall v. Phelps, 3 Johns. 401	607	Hickox v. Cleveland, 6 Ohio, 244	711
Hall v. Robinson, 3 Ind. 25	612	Hickey v. Critcher, Phil. 205	412
Hall v. Tufts, 15 Pick. 408	202	Higgins v. Butcher Yels. 20	712
Hallenbeck v. Cochran, 20 Hun, 415	20	Hight v. Monroe Co., 20 Ind. 510	175
Ham v. Smith, 6 Norris, 20	670	Hill v. Barnes, 11 N. B. 205	205
Hamann v. Newton, 4 Fed. Rep. 600	600	Hill v. Boston, 121 Mass. 244; 20 Am.	200
Hamilton v. Cunningham, 3 Brock, 200	600	Rep. 82	200
Hamilton v. Van Kaumlaar, 41 N. Y.	244	Hill v. Brewer 26 N. C. 124	600
244	244	Hill v. Freeman 2 Cosh. 200	600
Hammond v. Varian, 51 N. Y. 208	244	Hill v. Sterwood 1 Wis. 240	610
Ham v. Armstrong, 10 Iowa, 204	610	Hill v. Stevenson, 61 Me. 204; 10 Am.	270
Hankey v. Garrett, 1 Vea. 200	610	Rep. 211	270
Hankin v. Squires, 3 Elm. 105	149	Hobbs v. Patterson Horse R. Co.,	17 N. J. Eq. 75
Hankins v. Baker, 45 N. Y. 600	30	Hockley v. Deobroet, 45 Me. 60	600
Hanover R. Co. v. Coyle, 3 P. F. Smith,	600	Hoebergh v. Sumner, 9 Vt. 23	204
600	600	Hicks v. Kuchelberger, 3 Barr. 408	671
Hapgood v. Batcheller, 4 Metc. 273	600	Hicks v. Coleman 45 Wis. 105	600
Hardman v. Booth, 1 H. & C. 528	670	Hicks v. Lantry 25 Mass. 140	600
Hartins v. Standard Sugar Refinery, 120	600	Hodges v. New England Screw Co., 1 R.	142
Mass. 400	600	142	600
Harmony v. Bingham, 12 N. Y. 20, 107	107	Hodgkins v. Foster R. R., 112 Mass. 412	600
Harper v. Butler 3 Pet. 200	741	Hodges v. Le Bret, 1 Campb. 200	17, 10
Harpham v. Little, 60 Ill. 200	106	Hodges v. Shaw 1 Met. & K. 60	700
Harris v. Babbitt, 4 Dill 191	461	Hodnet v. Smith 2 Sweeney, 400	600
Harris v. Burwell, 25 N. C. 204	607	Hoff v. Rogers 202, 16 S. & R. 44	202
Harris v. Clark, 3 Comst. 98	672	Hoffman v. 5th Ins. Co., 22 N. Y. 405	405
Harris v. Hunsbach, 1 Barr. 573	107	Holbeck v. Jackson, 66 Ill. 407	108
Harrison v. Hicks, 1 Port. (Ala.) 600	704	Holbrook v. Hewson, 3 Camp. 201	600
Harrison v. Sawtel, 30 Johns. 240; 6 Am.	107	Holmes v. Trust Co., 100 U. S. 73	612
Dec. 207	107	Holmes v. W. 22 Ga. 607	611
Harrower v. Coia, 10 Barb. 201	610	Holmes v. W. 22 Ga. 607	611
Hart v. Carpenter, 24 Conn. 427	600	Holmes v. W. 22 Ga. 607	611
Hartford & N. H. R. Co. v. Crosswell, 6	214	Holmes v. W. 22 Ga. 607	611
Ell. 204	214	Holmes v. W. 22 Ga. 607	611
Hartford & N. H. R. Co. v. Kennedy, 12	214	Holmes v. W. 22 Ga. 607	611
Conn. 400, 200	214	Holmes v. W. 22 Ga. 607	611
Hartley v. Varner, 25 Ill. 201	106	Holmes v. W. 22 Ga. 607	611
Harvey v. Ball, 25 Ind. 20	607	Holmes v. W. 22 Ga. 607	611
Harvey v. Farala, 6 P. D. 100	607	Holmes v. W. 22 Ga. 607	611
Harvey v. Tama County, 20 Iowa, 200	600	Holmes v. W. 22 Ga. 607	611

TABLE OF CASES CITED.

xxiii

PAGE.		PAGE.	
Holroyd v. Marshall, 10 H. L. Cas. 191 ; 9 Jur. (N. S.) 213	436, 726	Insurance Co. v. Brame, 95 U. S. 757... 714	
Holt v. Green, 73 Penn. St. 198 ; 13 Am. Rep. 747.....	812	Insurance Co. v. Mosley, 8 Wall. 897 ... 88	
Holt v. Kernoldie, 1 Ired. 199.....	606	Insurance Co. v. Young's Adm., 23 Wall. 106	820
Honeycutt v. Angel, 4 Dev. & B. 306....	622	Isbell v. N. Y. & New Haven R. Co., 27 Conn. 501.....	657
Hood v. Hood, 110 Mass. 460.	324	Jackson v. Osborne, 9 Wend. 555.....	263
Hood v. Hood, 11 Allen, 196.....	324	Jackson v. Smith, 7 Cow. 717.....	830
Hookey v. Hatton, 1 Bro. C. C. 390	557	Jacobs v. Com., 2 Leigh, 709.....	48
Hopkins v. Crittenden, 10 Tex. 189.....	810	Jacobs v. St. Paul & Chicago Ry. Co., 20 Minn. 125 ; 18 Am. Rep. 360.....	650
Hopkins v. West, 2 Norris, 109.	680	James v. State, 55 Miss. 57 ; 3 Am. Rep. 496, 497.....	847
Horn v. Bray, 51 Ind. 555	164, 166	James v. Stephens, 2 Pat. & H. 11	797
Horry Dist. v. Harrison, 1 N. & McC. 554,	263	James v. Van Duyn, 45 Wis. 512	817
Hotchkiss v. Hunt, 49 Me. 219	668	Janvrin v. Maxwell, 23 Wis. 51	18
Hough v. Ry. Co., 100 U. S. 213 ; 34 Am. Rep. 621	349, 621	Jeffersonville, etc., R. Co. v. Jefferson's Admr., 28 Ind. 228.....	385
Houghton v. Bank, 28 Wis. 653 ; 7 Am. Rep. 107.....	820	Jenkins v. Elchelberger, 4 Watts, 121... 684	
Houser v. Thwing, 3 Pick. 492	413	Jennings v. Ruepuli, 8 T. R. 834.....	413
Houston v. Moore, 5 Wheat. 1.	510, 513	Jersey City & Bergen R. Co. v. Jersey City & Hoboken Horse R. Co. 20 N. J. Eq. 61.....	223
Howard v. Ingersoll, 13 How. 427.....	573	Jessup v. Carnegie, 80 N. Y. 441 ; s. c., 36 Am. Rep. 643.....	580
Howarth v. Dornell, 6 Jur. (N. S.) 1360.	573	Jewell v. Wright, 30 N. Y. 259.....	533
Howe v. Palmer, 3 B. & Ald. 321	18, 20	Jewett v. Draper, 6 Allen, 434	316
Howell v. Fountain, 3 Kelly, 176	94	Jewett v. Warren, 12 Mass. 300.....	18
Howell v. Knickerbocker Life Ins. Co., 44 N. Y. 276 ; s. c., 4 Am. Rep. 675..	319, 507	Johnson, In re, 72 Kans. 102.....	286
Howells v. Landore Steel Co., L. R., 10 Q. B. 62.....	345	Johnson v. Bank of North America, 5 Robt. 554.....	570
Hoyt v. City of Hudson, 27 Wis. 656, 664 ; 22 Am. Rep. 714.....	152, 247	Johnson v. Carpenter, 7 Minn. 176	276
Hoyt v. Mut. Ben. Ins. Co., 98 Mass. 539.....	318	Johnson v. Gallagher, 7 Jurist (N. S.), 273	821
Hubbard v. Callahan, 43 Conn. 524 ; 19 Am. Rep. 564	810	Johnson v. Knapp, 36 Iowa, 616	163
Huebner vs N. O. & C. R. Co., 23 La. Ann. 492.....	384	Johnson v. Lewis, Rice Eq. 40	729
Huelsenkamp v. Citizen's Ry. Co., 87 Mo. 537	658, 712	Johnson v. Pye, 1 Sid. 258.....	413
Huddleston v. Lowell Mach. Shop, 106 Mass. 283.....	349	Johnson v. R. R. Co., 81 N. C. 453	623
Hughes v. M. & M. R. Co., 12 Iowa, 261.	221	Johnson v. Westchester R. Co. 70 Penn. St. 357	386
Huldekoper v. Cotton, 3 Watts, 56	673	Johnston v. Laffin (S. C. U. S.), 23 A. L. J. 393	354
Hulme v. Tenant, 1 Bro. Ch. 16.....	821	Johnston v. Mayor, 62 Ga. 645	64
Humphreys v. Guillo, 13 N. H. 385....	263	Jones v. Andover, 10 Allen, 18, 21	809
Hunt v. Gray, 35 N. J. 237 ; 10 Am. Rep. 222	260, 262	Jones v. Brown, 54 Iowa, 74	188
Hunt v. Rousmanier, 8 Wheat. 174	363	Jones v. Gerock, 6 Jones Eq. 190	823
Hunter v. Warner, 1 Wis. 141.....	668	Jones v. Glass, 48 Iowa, 345.....	822
Hunter v. State, 40 N. J. 495.....	84	Jones v. Le Tombe, 3 Dallas, 384	143
Huntington v. Finch, 3 Ohio St. 445....	262	Jones v. Richardson, 10 Metc. 481, 488.	435
Huntington v. Knox, 7 Cush. 371.....	359		728
Hurst v. Beach, 5 Madd. 351.....	557	Jones v. Smith, 14 Ohio, 606	283
Hussey v. Thornton, 4 Mass. 407 : 3 Am. Dec. 224	668	Jones v. Underwood, 28 Barb. 481	626
Hutchinson, In re, L. R., 8 Ch. Div. 540,	573	Jones v. Wilson, 3 Jones, 434	794
Hutchinson v. Dubois, Mich. S. C. 1881.	240	Jones v. Wood, 4 Harr. 25	710
Hutchinson v. York, Newcastle & Ber- wick Ry., 5 Exch. 343.....	345	Jordan v. Stewart, 23 Penn. St. 244	263
Hyatt v. Adams, 16 Mich. 180.....	718	Kansas Pacific R. Co. v. Richardson, 26 Kans. 891	444
Hyde v. Goodnow, 3 Conn. 269	586	Karle v. K. C. St. J. & C. B. R. Co., 55 Mo. 476	385
Hyde v. Hyde, L. R., 1 P. & D. 180.....	383	Kalmes v. Gerrish, 7 Nev. 31	628
Iderton & Iderton, 3 H. Bl. 145	323	Kasson v. Naltner, 43 Wis. 646.....	829
Ill., etc., R. Co. v. Van Horn, 18 Ill. 257,	155	Kauffman v. Griesemer, 26 Penn St. 407.	153
Ialey v. Nichols, 12 Pick. 276	30	Keaton v. Davis, 18 Ga. 457.....	71
Imhoff v. Chicago, etc., 20 Wis. 364	756	Keene v. Keene, 13 C. B. (U. S.) 44	307
Imlay v. Union Branch R. Co., 26 Conn. 249.....	225	Keir v. Leeman, 3 L. T. 299.....	204
Ind. Nat. Bk. v. Weckerly, 67 Ind. 345..	180	Keith v. Pinkham, 13 Me. 501.....	657
Indianapolis, etc., R. Co. v. Dixie, 10 Ind. 306	718	Kelley v. Boston Lead Co., 128 Mass. 456	346
Indianapolis, etc., R. C. v. Hartley, 67 Ill. 439 ; 16 Am. Rep. 624.	222, 227	Kelley v. Mayor, 4 Hill, 263.....	520
Indianapolis R. Co. v. McAhren, 43 Ind. 553.....	227	Kelley v. Norcross, 121 Mass. 508.	346
Indig v. Natl. City Bank, 80 N. Y. 100..	736	Kellogg v. Rockland, 19 Conn. 446.....	184
Inglish v. Breneman, 5 Ark. 377.....	10	Kelly v. Hannibal & St. Jo. R. Co., Mo. 604	70
Insurance Co. v. Babcock, 43 N. Y. 613.	819	Kelly v. Riley, 106 Mass. 339 ; 8 Am. Rep. 336	384
		Kemp v. Balls, 10 Ex. 610.....	448
		Kendall v. Brownson, 47 N. H. 186.....	796
			149

	PAGE.		PAGE.
Kendall v. Lawrence, 22 Pick. 549	354	Lamb v. C. & A. R. Co., 46 N. Y. 371; s. c., 7 Am. Rep. 327.....	539
Kendall v. May, 10 Allen, 59	389	Lamb v. Grover, 47 Barb. 317.....	60
Kennedy v. Bank, 18 Penn. St. 347....	263	Lamb v. Lane, 4 Ohio St. 167.....	734
Kennedy v. Brown, 21 Kans. 171.....	251	Lambeth v. North Carolina R. Co., 66 N. C. 794; 8 Am. Rep. 508.....	385
Kennedy v. Gibson, 8 Wall. 498	510	Lamburn v. Cruden, 3 M. & G. 253.....	343
Kennedy v. Northup, 15 Ill. 154.....	106	Lange v. Benedict, 73 N. Y. 12; 30 Am. Rep. 80.....	137
Kennedy v. Ware, 1 Barr. 445.....	638	Langton v. Horton, 1 Hare, 549.....	436
Kenney v. Ingalls, 126 Mass. 483.....	303	Langton v. South Carolina R. R., 2 S. C. (N. S.) 218.....	313
Kenworthy v. Sawyer, 125 Mass. 23....	823	Lanier v. Mayor, 59 Ga. 188.....	63
Kenyon v. Smith, 24 Ind. 11.....	585	Laning v. N. Y. C. R. R. Co., 49 N. Y. 521; s. c., 10 Am. Rep. 417.....	493
Kenyon v. Williams, 19 Ind. 44.....	142	Lansing v. Smith, 4 Wend. 7; 21 Am. Dec. 89.....	403
Ke mott v. Ayer, 11 Mich. 181	585	Lash v. Lambert, 15 Minn. 416; 3 Am. Rep. 143.....	313
Kerr v. Freeman, 43 Miss. 129.....	149	Laspeyre v. McFarland, N. C. Term, 187	619
Kerr v. Merchants' Exch. Co., 3 Edw. 815.....	263	Lassiter v. Wood, 63 N. C. 300.....	616
Kerr v. Moon, 9 Wheat. 565	322	Laton v. King, 19 N. H. 280.....	344
Kerrigan v. Rautigan, 43 Conn. 17.....	816	Lawrence v. Clark, 36 N. Y. 123.....	495
Ketchum v. Brennan, 53 Miss. 593.....	607	Lawrence v. Kemp, 1 Duer, 363	472
Ketchum v. Ex. Co., 52 Mo. 390.....	150	Lawrence v. Stonington Bank, 6 Conn. 521	263
Klewert v. Rindskopf, 46 Wis. 381	204	Lazier v. Horan, Iowa, S. C., 1880.....	736
Kilgore v. Powers, 5 Blackf. 23	310	Leake v. Gilchrist, 2 Dev. 75.....	741
Killip v. Putnam F. Ins. Co., 28 Wis. 484; 9 Am. Rep. 503	303	Leary v. Leary, 18 Ga. 698.....	71
Killock v. Grey, 4 Russ. 285	531	Leavenworth v. Brockway, 2 Hill, 201..	500
Kimball v. Leland, 110 Mass. 335	371	Leavitt v. Fletcher, 10 Allen, 119....	296
Kimball v. Masters, etc., Grand Lodge of Masons, Mass.	475	Leavitt v. Morrow, 6 Ohio St. 71.....	795
Kimball v. Merrick, 20 Ark. 12.....	31	Leavitt v. Putnam, 8 Comst. 494.....	99
Kimm v. Weippert, 46 Mo. 532; 2 Am. Rep. 541	322	Leeds v. Cheetham, 1 Sim. 146.....	283
King v. Baldwin, 17 Johns. 384, 390, 393, 402.....	307	Lee v. Sandy Hill, 40 N. Y. 443.....	219
King v. Boston & Worcester R., 9 Cush. 112	345, 349	Legg v. Legg, 3 Mass. 99.....	536
King v. Sarria, 69 N. Y. 24; s. c., 25 Am. Rep. 123.....	532	Leggett v. Hyde, 58 N. Y. 272; s. c., 17 Am. Rep. 244.....	530
Kingman v. Perkins, 105 Mass. 111. 354, 371	284	Lehigh Com. v. Field, 8 W. & S. 232... ..	662
Kingsbury v. Westfall, 61 N. Y. 356	364	Leitch v. Wells, 48 N. Y. 587.....	617
Kinney v. Allen, 1 Hughes, 103	443, 444	Lemay v. Williams, 32 Ark. 163	10
Kinney v. Crocker, 18 Wis. 74.....	445	Leonard v. Columbia Steam. Nav. Co., 39 N. Y. 48	160, 162
Klassenger v. N. Y., etc., R. Co., 56 N. Y. 543.....	311	Leonard v. Davis, 1 Black. 476.....	19
Kitchen v. Mobile Bk., 14 Ala. 233.....	600	Leonard v. Vredenburgh, 8 Johns. 29; 5 Am. Dec. 317	613
Klein v. N. Y. Life Ins. Co., U. S. Sup. Ct., Oct., 1881.....	816	Lerned v. Johns, 9 Allen, 419	357
Kuaggs v. Green, 48 Wis. 601; 33 Am. Rep. 838	262	Lester v. Bowman, 39 Iowa, 611	163
Knerr v. Hoffman, 65 N. H. 126	786	Levy v. Franklin Sav. Bk., 117 Mass. 443.	374
Knight v. Clements, 8 Ad. & Ell. 215....	573	Lewis v. Rosser, 16 W. Va. 333	789
Knowlton v. Ackley, 8 Cush. 97	813	Lewis v. Smith, 107 Mass. 334.....	149, 150
Knowlton v. Erie Ry. Co., 19 Ohio St. 260; s. c., 2 Am. Rep. 395	668	Lewis v. Wilkins, Phil. Eq. 303.....	609
Knox v. Clifford, 38 Wis. 656; 20 Am. Rep. 28	310	Lewis v. Elvain, 16 Ohio, 347.....	393
Kohler v. Hayes, 41 Cal. 455.....	713	Lexington & Ohio R. Co. v. Applegate, 8 Dana, 289	223, 225
Kohler v. Smith, 2 Cal. 597	505	Lichtenstein v. Mellis, 8 Or. 404; s. c., 34 Am. Rep. 592.....	365, 504
Kramer v. San Francisco R. Co., 25 Cal. 434.....	223	Lincoln v. Taunton Manuf. Co., 9 Allen, 181.....	320
Krom v. Levy, 3 T. & C. 704; 6 Wend. 253.....	397	Lingen v. Lingen, 45 Ala. 410.....	337
Kucheman v. C. C. & D. R. Co., 46 Iowa, 366.....	847	Linn v. Gilman, Mich. S. C. 1881.....	330
Kunkle v. Town of Franklin, 13 Minn. 127.....	551	Lipscomb's Adm. v. Littlepage, 1 H. & M. 453.....	794
Labar v. Koplin, 4 N. Y. 547.....	228	Litchfield v. White, 3 Sandf. 545	549
Lackawanna & B. R. R. Co. v. Chene- with, 2 P. F. Smith, 382.....	142	Littauer v. Goldman, 73 N. Y. 593; s. c., 28 Am. Rep. 171	485
Lackland v. R. Co., 31 Mo. 181.....	241	Little v. Herndon, 10 Wah. 31	284
Lacy v. Dubuque Lumber Co., 43 Iowa, 510	349	Livezey v. Philadelphia, 64 Penn. St. 106; 3 Am. Rep. 578	748
Ladd v. Hill, 4 Vt. 164	143	Livingston v. McDonald, 21 Iowa, 160 ..	133
Ladd v. New Bedford R. R., 119 Mass. 412; 20 Am. Rep. 381.....	830	Lobdell v. Baker, 1 Met. 193	485
Lafin & Rand Powder Co. v. Sinsheimer, 48 Md. 411; 30 Am. Rep. 472 ..	823	Locke v. Lewis, 124 Mass. 1; 26 Am. Rep. 631.....	363
Lake v. Clark, 97 Mass. 846.....	323	Loft v. Dennis, 1 El. & El. 474.....	283
Lake v. Dillard, 55 Miss. 63	830	Logansport v. Wright, 25 Ind. 512	773
Lamar v. Scott, 3 Strobb. 562.....	133	Londagan v. Hammer, 30 Iowa, 155....	133
		Long v. Fuller, 21 Wis. 131.....	829
		Long v. State, 22 Ga. 40.....	83

TABLE OF CASES CITED.

XXV

PAGE.	PAGE.
Langhurst v. Star Ins. Co., 19 Iowa, 284	McLellan v. Crofton, 6 Mo. 307
183	149
Loomis v. Newhall, 15 Pick. 169	McMahon v. Smith, 47 Conn. 291; 24 Am.
187	Rep. 67
Loring v. Small, 25 Iowa, 371; 22 Am.	304
Rep. 126	300
189	McManning v. Farrar in Mo. 376
Loring v. Thorndike, 5 Allen, 277	303
234, 240	McMicken v. Deauchamp, 2 La. 300
Louisville etc., R. Co. v. Com., 14 Bush,	303
330; 23 Am. Rep. 376	McMullan v. Bull's Head Bank, 28 Ind.
443	11 2 Am. Rep. 221
167	McMullen v. Boyle, 4 Iowa 304
189	307
Lovell v. Howe, 10 P. D. 161	McMurry v. Peabody, 4 Mon. 40
345	657
Low v. Hall 47 N. Y. 104	McNeil v. Tenth Nat. Bank, 43 N. Y. 285;
505	7 Am. Rep. 141
Low v. Harris, 1 Penn. 340	354, 606
232	McPheters v. Merriman Bridge Co., 20
Lowry v. Innan 44 N. Y. 119	Mo. 605
182	190
Lowry v. Neward, 25 N. Y. 249	McPherson v. Meek, 30 Mo. 345
500	107
Loyd v. H. & St. J. R. Co., 51 Mo. 400	McRae v. Mattoon, 19 Pick. 63
353	33
Lucas v. Campbell, 86 Ill. 447; 31 Am.	McVey v. Castrol, 70 N. Y. 235; 26 Am.
Rep. 61	Rep. 625
496	319
Lucas v. Governor, 6 Ala. (N. S.) 328	Machine Co. v. Wilson, L. R., 3 App.
232	578
Lucas v. New Bedford, etc., R. Co., 6	584
Gray, 84	311
186	Mackay v. N. J. Cent. R. Co., 14 Blatchf.
Ludwick v. Huntzinger, 3 W. & R. 51	65
212	190, 100
Lumb v. Jenkins, 100 Mass. 52	Mackenzie v. British Linen Co., 6 App.
226	Can. 25
Lund v. Inhab. of Tyngaburgh, 9 Cush.	704
42	311
55, 65	Macomber v. Dunham, 3 Wend. 530
Luna v. Thornton, 1 M. Gr. & Scott, 379.	616
425	Macou v. Macou, 75 N. C. 379
Lunt v. London, etc., R. Co., L. R.,	62
10, D. 277	280
444	Magaw v. Lambert, 3 Penn. St. 444
30	280
Lutlin v. Benin, 11 Med. 60	Maghee v. C. & A. R. R. Co., 45 N. Y.
30	514, 521; s. o. 6 Am. Rep. 124
Luther v. Wisconsinstet Co., 9 Cush.	520
171	Maguire v. Middlesex R. Co., 115 Mass
343, 708	236
Lyon v. Fishmongers' Co., L. R., 1	712
App. Cas. 692	231
401	Mahaska Co. v. Ingalls, 10 Iowa, 81
304	Maher v. Central Packet R. Co., 67 N.
McBride v. Farmers' Bank, 29 N. Y. 410.	Y. 12
500	713
McCabe v. Rainey, 22 Ind. 309	720
322	McBler v. Wise, 20 Wis. 540
McCabe v. Woodin, 65 N. Y. 450; 22	140
Am. Rep. 644	Maltman v. Williamson, 69 Ill. 423
720, 720	140
McCall v. Clayton, Bush. 421	Mandlebaum v. McDonell, 29 Mich. 78;
635	14 Am. Rep. 61
McCarger v. Hood, 47 Cal. 161	338
661	Manhattan Co. v. Thompson, 58 N. Y. 80.
661	319
McCarthy v. Chicago, Rock Island &	Manhattan Oil Co. v. Camden & Am-
Pacific R. Co., 19 Kans. 46; 20 Am. Rep.	boy R. R. Co., 62 Barb. 72
743	62
102, 103, 102	Manley v. Boycott, 15 E. C. L. 45
102	603
McConnell v. Reed, 4 Seam. 117	Mann v. Executors of Mann, 1 Johns.
103, 100	Ch. 221
120	556
McCormick v. Burt, 95 Ill. 263; 25 Am.	410
Rep. 169	Manning v. Johnson, 30 Ala. 446
120	410
McCormick v. Fitzmorris, 20 Mo. 24	Manafield Coal and Coke Co. v. McEnery,
304	10 Norris, 105; 26 Am. Rep. 602
322	600
McCormick v. Sullivan, 16 Wheat. 192	Manufacturing Co. v. Trainor, 161 U. S.
160	61
McCoy v. Lockwood, 71 Ind. 316	303, 308
160	Marcy v. Barnes, 16 Gray, 102
McCracken v. San Francisco, 16 Cal. 509.	643
319	Marcy v. Crawford, 16 Conn. 540
610	167
McCrary v. Slaughter, 66 Ala. 230	Marcy v. Marcy, 25 Conn. 306
310	160
McCullough v. Gillmore, 11 Penn. St.	Marietta Iron Works v. Lottimer, 25 Ohio
370	St. 621
307	310
McCumber v. Gilman, 15 Ill. 381	620
600	Mark v. Nat. F. Ins. Co., 24 Hun, 509
600	620
McDaniel v. Correll, 19 Ill. 286	Markay v. Mut. Ben. Ins. Co., 100 Mass.
71	78
McDaniel v. Truick, 27 Ga. 398	314
71	91
McDonald v. Chic. & N. W. Ry. Co., 26	180
Iowa, 124	Marshall v. Roberts, 18 Minn. 426; 10
730	Am. Rep. 201
McDonald v. Mallory, 71 N. Y. 547; 20	109
Am. Rep. 634	300
100	Marshall v. Sullivan, 63 Ill. 216
McFarland v. Peabody Ins. Co., 6 W.	300
Va. 631	Marston v. Baldwin, 17 Mass. 606
306	620
McGahay v. Alston, 3 M. & W. 213	Martin v. Bently, 54 Ill. 100
306	620
McGovern v. N. Y. Cent., etc., R. Co.,	Martin v. G. N. Ry. Co., 31 Eng. C. L.
67 N. Y. 417	170
712	710
McGrath v. Bell, 23 N. Y. Super. 100	122
644	Martin v. Jett, 13 La. 501
McGrath v. N. Y. C. & H. Co., 56 N. Y. 408;	122
17 Am. Rep. 310	Martin v. Mathiot, 14 S. & B. 214; 16 Am.
445, 691	Dec. 401
602	607, 654, 607
McHugh v. Schuylkill County, 67 Penn.	520
391; 3 Am. Rep. 445	Martin v. Mott, 12 Wheat. 19
702	192
McKenna v. Merry, 61 Ill. 171	Martin v. Riddle, 20 Penn. St. 415
406	347
McKay v. N. Y. C. & H. Co., 35 N. Y. 73	Martin v. State, 61 Ga. 307
444	17
McKaye v. Hanover F. Ins. Co., 31 N.	Manney v. Baldwin, 2 Hill Ch. 429
Y. 29	727
673	Mather v. Chapman, 6 Conn. 54
361	306
McKnight v. Dunlop, 4 Barb. 36	308
505	Mathews v. Aiken, 1 Com. 606
310	650
McLane v. Abrams, 2 Nev. 189	650
304	Mathews v. Davis, 6 Humph. 324
604	650
McLane v. Flemming, 6 Otto, 245	Mason v. Farm Buildings Ins. Co., 73
720	N. Y. 310; 29 Am. Rep. 149
305	650
McLaughlin v. Johnson, 48 Ill. 169	
720	
McLean v. Flemming, 96 U. S. 245	
305	

	PAGE.		PAGE.
Matthews v. Coalter, 9 Mo. 686	262	Mitchell v. Winslow, 2 Story, 680	436, 725
Maxey v. Wise, 25 Ind. 1	398		728
Maxon v. Scott, 55 N. Y. 247	819	Mochazo v. Willes, 3 B. & Ad. 353	160
Maxwell v. Goetschius, 40 N. J. L. 383 ; 29 Am. Rep. 242	398	Mohawk Bank v. Broderick, 10 Wend. 306	570
Maxwell v. Morehart, 66 Ind. 301	180	Monnett v. Sturges, 25 Ohio St. 384	310
May v. Wannemacher, 11 Mass. 202 ..	381	Monongahela Nav. Co. v. Coons, 6 N. & S. 117.	226
Mayes v. Deutler, 33 Penn. St. 495	398	Monroe v. Douglass, 1 Seld. 447	540, 586
Mayo v. Boston & Maine R. R., 104 Mass. 137	710	Monson v. Palmer, 8 Allen, 551	335
Mayo v. Furze, 3 Hill, 612	770	Montague v. Dent, 10 Rich. L. 136	473
Mayor v. Hamilton F. Ins. Co., 39 N. Y. 45.	801	Moody v. Thurston, 1 Str. 481	234
Mayor, etc., of Rome v. Omberg, 33 Ga. 46	766	Moody v. Wright, 13 Metc. 17, 32 ...	435, 726
Mead v. Degolyer, 16 Wend. 685	506		728
Meade v. Beale, Taney, 339, 360	577	Moore v. Kendall, 2 Priv. 99	313
Mease v. Wagner, 1 McCord, 395	167	Moore v. Meacham, 10 N. Y. 207	88
Mechanics & Traders' Bank v. Crow, 60 N. Y. 85	706	Moore v. Met. Nat. Bank, 55 N. Y. 41 ; 14 Am. Rep. 173	695
Medway v. Needham, 16 Mass. 157	394	Moore v. Pennell, 52 Me. 162	239
Meessel v. Lynn & Boston R. Co., 8 Allen, 234	711	Moore v. Ryder, 65 N. Y. 438	495
Meigher v. Strong, 6 Minn. 177	398	Moore v. Sample, 3 Ala. (N. S.) 319	239
Meike v. St. Sav. Inst. 36 Ind. 355	264	Moore v. Smith, 19 Ala. 774	610
Melan v. Duke de Fitz James, 1 Bos. & P. 138	160	Moreland v. Lawrence, 23 Minn. 84	313
Melchoir v. McCarty, 31 Wis. 253; 11 Am. Rep. 605	813	Morgan v. Clayton, 61 Ill. 40	106
Melvin v. Lamar Ins. Co., 36 Ill. 446; 22 Am. Rep. 199	137	Morgan v. Jones, 8 Exch. 620	307
Memphis City R. Co. v. Memphis, 4 Cold. 406	219	Morgan v. Vale of Neath R'y, 5 B. & S. 570	344
Menderback v. Hopkins, 8 Johns. 436 ..	794	Morgan v. Walmough, 5 Whart. 125	239
Menges v. Wertman, 1 Penn. St. 223 ..	398	Morley v. Altenborough, 3 Exch. 500 ..	255
Merchants' Bank v. Richards, 6 Mo. App. 454	354	Morley v. Town of Metamora, 78 Ill. 394	232, 235
Merchants' Bank v. Taylor, 21 Ga. 334 ..	71	Morrill v. Aden, 19 Vt. 505	413
Merchants' Nat. Bank v. Nat. Eagle Bank, 101 Mass. 281	378	Morrill v. Noyes, 56 Me. 458	436
Merriam v. Cunningham, 11 Cush. 40	413	Morris v. Vanderlin, 1 Dall. 65	263
Merrill v. Rinker, 1 Bald. C. C. 538 ..	668	Morrison v. Baker, 81 N. C. 76	163
Merritt v. Parker, 1 N. J. 480	480	Morrison v. Blodgett, 8 N. H. 238	240
Mersereau v. Norton, 15 Johns. 179 ..	239	Morrison v. Erie R'y Co., 56 N. Y. 302 ..	385
Metropolitan Board of Works v. McCart- hy, L. R., 7 H. L. 243	401	Morse v. Buffalo Fire & Marine Ins. Co., 30 Wis. 534 ; s. C., 11 Am. Rep. 587 ..	649
Webster v. Wood, 8 Ch. D. 606	365	Morse v. Glendon Co., 125 Mass. 282 ..	346
Meyer v. Hilscher, 47 N. Y. 270	683	Moses v. B. & M. R., 32 N. H. 523 ..	576, 578
Meyer v. Pacific R. Co., 40 Mo. 151	385	Moses v. Pittsburgh & Ft. Wayne R. Co., 21 Ill. 516	222, 226
Meyers v. Rahte, 46 Wis. 658	321, 324	Moss v. Livingston, 4 Comst. 208	143
Mickle v. Miles, 31 Penn. St. 20	284	Moss v. State, 10 Mo. 333	452
Middleton v. Melton, 10 B. & C. 317	236	Mostyn v. Febrigas, 1 Cowp. 161	160
Milburn v. City of Cedar Rapids, 12 Iowa, 246	217, 221, 223, 227	Mount Holly Turnpike Co. v. Ferree, 2 C. E. Green, 117	695
Milford v. Holbrook, 9 Allen, 17	296	Mt. Pleasant v. Breeze, 11 Iowa, 399 ..	210
Milhan v. Sharp, 37 N. Y. 611	219, 227	Mowry v. Bishop, 5 Pal. 98	311
Milk v. Moore, 39 Ill. 584	149	Muckleroy v. Bethany, 27 Tex. 551	264
Miller v. Bascom, 28 Mo. 352	668	Muhlenbrink v. Commissioners, 13 Vroom, 364 ; 36 Am. Rep. 518	508
Miller v. Burroughs, 4 Johns. Ch. 436 ..	311, 375	Mumford v. Overeers, 2 Rand. 314	235
Miller v. Lanbach, 47 Penn. St. 154 ..	153, 480	Munger v. Shannon, 61 N. Y. 251	520
Miller v. Race, 1 Burr. 452	299	Munro v. Munro, 7 Cl. & Fin. 343	327, 332
Milliken v. Martin, 66 Ill. 13	264	Munro v. Saunders, 6 Bligh, N. B. 498 ..	326
Milliken v. Pratt, 125 Mass. 374; 28 Am. Rep. 241	322	Munroe v. Eastman, 31 Mich. 263	264
Millington v. Fox, 3 Myl. & Cr. 338	196	Murphy v. Lucas, 58 Ind. 360	180
Mills v. Brooklyn, 32 N. Y. 489	764	Murphy v. Phillips, 35 L. T. (N. S.) 477.	349
Mills v. Charleton, 29 Wis. 400	398	Murray v. Lackey, 2 Murph. 368	631
Mills v. M. C. R. R. Co., 45 N. Y. 626 ; s. C., 6 Am. Rep. 152	580	Murray v. N. Y. Life Ins. Co., N. Y. App., 1881	150
Mills v. Starr, 2 Ball. 359	733	Murray v. Smith, 1 Duer, 412	330
Mills v. Wyman, 3 Pick. 207	688	Musser v. Brink, 68 Mo. 242	610
Milne v. Huber, 3 McLean, 212	398	Myers v. Harvey, 2 P. & W. 478	663
Mil. & St. P. R. Co. v. Smith, 7 Chic. Leg. News, 174	578	Myers v. Meinrath, 101 Mass. 366; 3 Am. Rep. 363	311
Miner v. Gilmour, 12 Moore P. C., 156.	274		
Minerv. Paris Exchange Bk. 53 Tex. 559.	677	Nash v. Hall, 4 Ind. 444	147
Mitchell v. Commonwealth, 1 Wright, 187	684	Natcher v. Natcher, 11 Wright, 496	671
Mitchell v. Lapage, Holt's N. P. 253 ..	370	National Bank v. Franklin, 20 Kans. 264.	264
Mitchell v. Peace, 7 Cush. 350	374, 376	Nat. Pemberton Bank v. Porter, 125 Mass. 333; 28 Am. Rep. 235	373
		Nebeker v. Cutsinger, 48 Ind. 436	181
		Needham v. Grand T. Ry. Co., 38 Vt. 294, 295	160, 718
		Negley v. Lindsay, 17 P. F. Smith, 217; 5 Am. Rep. 427	703

TABLE OF CASES CITED.

xxvii

	PAGE.		PAGE.
Nelson v. Hardy, 7 Ind. 357.	163	Paine v. Wilcox, 16 Wis. 203 ...	851
Nevins v. Peoria, 41 Ill. 502.	774	Pakalinsky v. N. Y. Cent., etc., R. Co., 82 N. Y. 424.	445, 691
New Albany v. Burke, 11 Wall. 98.	138	Palmer v. Blain, 55 Ind. 11.	166
Newcomb v. Presbrey, 8 Metc. 406.	368	Palmer v. Forbes, 23 Ill. 801.	790
Newell v. Smith, 49 Vt. 255.	41	Palmer v. Howard County, 46 Iowa, 61.	898
N. J. Transp. Co. v. West, 32 N. J. 91.	444	Palmer v. Waddell, 22 Kans. 852.	244
N. J. Steam Nav. Co. v. Merchants' Bank, 6 How. 344.	41	Paramore v. Linsey, 63 Mo. 68.	260, 262
Newton v. Kennerly, 31 Ark. 620.	813	Parish v. Stone, 14 Pick. 198; 25 Am. Dec. 390.	872
Newton v. Wilson, 3 Hen. & M. 470.	284	Park v. Baker, 7 Allen, 78.	475
Newman v. Alvord, 51 N. Y. 189; s. c., 10 Am. Rep. 568.	592	Park Bank v. Watson, 42 N. Y. 490; s. c., 1 Am. Rep. 573.	496
Newman v. Anderton, 5 B. & P. 224.	284	Parker v. Canfield, 37 Conn. 250; 9 Am. Rep. 17.	610
Newman v. Bean, 21 N. H. 83.	240	Parker v. City of Syracuse, 31 N. Y. 376.	520
Newman v. Sylvester, 42 Ind. 106.	141	Parks v. Newburyport, 10 Gray, 28. 243, 768	768
New York City v. Furze, 3 Hill, 612.	770	Parmlee v. Catherwood, 36 Mo. 479.	668
N. Y. Life Ins. Co. v. Statham.	600	Patten v. Chicago & N. W. Ry. Co. 32 Wis. 533.	756
N. Y. & N. H. R. Co. v. Schuyler, 34 N. Y. 30.	354	Patterson's Appeal, 48 Penn. St. 342.	238
Niagara F. Ins. Co. v. De Graff, 12 Mich. 124.	651	Patterson v. R. Co., 26 P. F. Smith, 389.	684
Nichols v. Eaton, 91 U. S. 716.	208	Patton v. McCane, 15 B. Monr. 555.	667
Nichols v. Johnson, 10 Conn. 192.	284	Paul v. Frazier, 3 Mass. 71; 3 Am. Dec. 295.	448
Nichols v. Mudgett, 32 Vt. 545.	204	Paul v. Stackhouse, 2 Wright, 302.	688
Nichols v. Pinner, 18 N. Y. 295; s. c., 23 Id. 264.	486	Payne v. Burnham, 62 N. Y. 69.	477
Nicholson v. Lancashire & Y. Ry. Co., 3 H. & C. 534.	756	Payne v. Cutter, 13 Wend. 605.	495
Nickerson v. Harriman, 38 Me. 277.	718	Peake v. Darwin's Est., 25 Vt. 82.	798
Noate v. Callender, 20 Ohio St. 199.	86	Pearce v. Olney, 20 Conn. 544.	32
Nolly v. Callaway County Court, 11 Mo. 447.	236	Pearse v. Atwood, 13 Mass. 324.	467
Noonan v. City of Albany, 79 N. Y. 470; 35 Am. Rep. 450.	480	Pearse v. Hennessy, 10 R. I. 223.	813
Normington v. Cook, 2 T. C. 423.	506	Pearsoll v. Chapin, 8 Wright, 9.	703
N. A. Fire Ins. Co. v. Zaenger, 63 Ill. 464.	490	Pelzer v. Peticolas, 50 Tex. 688; 33 Am. Rep. 621.	761
Norway Plains Co. v. B. & M. R. Co., 1 Gray, 263.	571	Pekin v. Brereton, 67 Ill. 477; 16 Am. Rep. 629.	783
Kunn v. Fabian, L. R., 1 Ch. App. 35.	851	Pekin v. Newell, 26 Ill. 320.	219
Nutting v. Page, 4 Gray, 561.	88	Pembroke v. Grover, 11 Allen, 90.	397
Oates v. Nat. Bank, 106 U. S. 239.	577	Pendleton v. Jones, 32 N. C. 249.	643
O'Connor v. Hallinan, 103 Mass. 547.	380	Peufield v. Thayer, 2 E. D. Smith, 235.	873
O'Connor v. Pittsburg, 18 Penn. St. 187.	780	Pennsylvania R. Co. v. Beale, 23 P. F. Smith, 504.	690
O'Connor v. Roberts, 120 Mass. 227.	346	Pennsylvania R. Co. v. Books, 7 P. F. Smith, 389.	699
O'Donoghue v. Akin, 2 Duv. 478.	718	Pennsylvania R. Co. v. Kilgore, 32 Penn. St. 292.	386
O'Donnell v. Allegheny Valley R. R. Co., 9 P. F. Smith, 239.	652	Pennsylvania R. Co. v. Matthews, 36 N. J. 531.	444
O'Neil v. Buffalo Fire Ins. Co., 3 Comst. 122.	649	People v. Baker, 76 N. Y. 87; s. c., 32 Am. Rep. 274.	515
Odiorne v. Micklely, 2 Gall. 51-53.	830	People v. Bartlett, 8 Hill, 570.	50, 53
Ogilvie v. Knox Ins. Co., 22 Haw. 330.	136	People v. Cook, 30 How. Pr. 110.	53
Okcott v. Supervisors, 16 Wall. 678.	581	People v. Davis, 56 N. Y. 96.	88
Oliver v. Dix, 1 Dev. & Bat. Eq. 158.	638	People v. Kendall, 25 Wend. 401.	414
Olmstead v. Gouls, 18 Johns. 12.	613	People v. Kerr, 27 N. Y. 188.	238
Ordway v. Colcord, 14 Allen, 59.	303	People v. Knapp, 42 Mich. 247; 36 Am. Rep. 438.	109
Osborn v. Adams, 18 Pick. 245.	361	People v. Lynch, 51 Cal. 15; Am. Rep. 367.	396
Osborn v. Gillett, L. R., 8 Exch. 88.	716	People v. Manning, 8 Cow. 297.	52
Osborn v. Thompson, 9 C. & P. 337.	148	People v. Thornton, N. Y. S. C. 1881.	422
Osborn v. United States B'k, 9 Wheat. 738.	513	People v. Tibbetts, 19 N. Y. 523.	402
Osborne v. Duke of Leeds, 5 Ves. 369.	557	People v. Tubbs, 37 N. Y. 586.	50, 52
Osborne v. Union Ferry Co., 53 Barb. 629.	756	People v. Trim, 37 Cal. 274.	847
Ottawa v. Perkins, 94 U. S. 280.	580	People v. Williams, 3 Abb. Ct. App. Dec. 593.	86, 88
Otis v. Still, 8 Barb. 108.	436	People's Bank v. Gridley, 91 Ill. 457.	355
Overman v. Hoboken City Bank, 1 Vroom, 61.	377	Percy, In re., 36 N. Y. 651.	559
Overton v. Barrister, 3 Hare, 503.	414	Perkins v. Jones, 26 Ind. 502.	812
Overton v. Bolton, 9 Heisk. 762; 24 Am. Rep. 367.	310	Peterson v. Chemical Bank, 32 N. Y. 22.	749
Owens v. Woodsman, L. R., 3 Q. B. 469.	510	Peterson v. Whitebreast Coal and Min- ing Co., 50 Iowa, 678.	199
Paddon v. Taylor, 44 N. Y. 371.	497	Pettee v. Appleton, 114 Mass. 114.	612
Page v. Gardner, 20 Mo. 508.	436	Pettigrew v. Evansville, 25 Wis. 223; 3 Am. Rep. 50.	152, 775
Paigne v. Ott, 5 Den. 406.	506	Pettingill v. Devin, 35 Iowa, 854.	106
Paine v. Caswell, 63 Me. 80; 28 Am. Rep. 21.	314	Petit v. Teal, 51 Ga. 57.	71

	PAGE.		PAGE.
Philadelphia, etc., R. Co. v. Hassard, 75 Penn. St. 357.....	713	Proctor v. Jones, 2 O. & P. 532, 534...17,	20
Phila. & Trenton R. Co., 6 Whart. 25....	226	Protsman v. I. C. R. R. Co., 6 Ind. 468..	219
Phillips v. Cook, 24 Wend. 389.....	241	Pruyn v. Milwaukee, 18 Wis. 357.....	310
Phillips v. Graves, 20 Ohio St. 371; 6 Am. Rep. 675.....	303	Puckett v. Read, 31 Ark. 131.....	15
Phillips v. Hunnewell, 4 Greenl. 376....	18	Pullen v. Hutchinson, 12 Shepl. 254....	264
Phillips v. McCombs, 58 N. Y. 494.....	557	Puller v. Snow, 3 Dev. 238.....	263
Phillips v. Reus., etc., R. Co. 49 N. Y. 177.....	384	Pumpelly v. Green Bay Co., 18 Wall. 180.....	779
Phinney v. Baldwin, 16 Ill. 108.....	310	Putnam v. Commonwealth Ins. Co., U. S. C. C., N. Y. 188.....	650
Phipps v. Ingram, 3 Dowl. 669.....	587	Putnam v. Putnam, 8 Pick. 433.....	324
Pickering v. Busk, 15 East, 38-43....	668, 629	Putnam v. Wise, 1 Hill, 234.....	609
Pickering v. Flisk, 6 Vt. 102.....	162		
Pickering v. Ilfracombe Ry. Co., L. R., 3 C. P. 235.....	354	Quigley v. De Haas, 82 Penn. St. 267....	637
Pico v. Webster, 14 Cal. 202.....	252		
Piedmont & Arlington Ins. Co. v. Ewing, 92 U. S. 377.....	318, 330	Rabory v. Peyton, 2 Wheat. 385.....	484
Pierce v. Bartrum, Cowp. 269.....	567	Radford v. Carwile, 13 W. Va. 572....	823
Pierce v. Chicago, etc., Ry. Co., 36 Wis. 283.....	586	Radley v. Ry. Co., L. R., 1 App. Cas. 754.....	708
Pierce v. Jackson, 6 Mass. 242.....	239	Rafael v. Verelst, 2 W. Bl. 1055.....	161
Piercey v. Piercey, 5 W. Va. 199.....	263	Raferty v. Ins. Co., 29 Me. 97.....	649
Pierson v. Halsey, 19 Iowa, 114.....	816	Railroad Co. v. Aspell, 23 Penn. St. 147.	345
Pike v. Brown, 7 Cush. 133.....	316	Railroad Co. v. Derby, 14 How. 468....	658
Pine Grove v. Talcott, 19 Wall. 666....	577	Railroad Co. v. Helleman, 18 Wright. 60.....	690
Pittsburgh & Connellsville R. R. Co. v. McClurg, C. P. F. Smith, 294.....	652, 660	Railroad Co. v. Husen, 95 U. S. 465....	380
Pixley v. Clark, 35 N. Y. 520.....	273	Railroad Co. v. Long, 25 P. F. Smith, 257.....	707
Planter's Bank v. Union Bank, 16 Wall. 483.....	204	Railroad Co. v. Pearson, 22 P. F. Smith, 169.....	707
Plummer v. Webb, 1 Wall. 73, 80....	714, 718	Railroad Co. v. Reeves, 10 Wall. 176....	748
Polinsky v. People, 73 N. Y. 65.....	567	Railroad Co. v. Schurmer, 7 Wall. 272..	401
Pollock v. Stables, 13 Q. B. (N. S.) 705.	586	Railroad Co. v. Sprayberry, 8 Baxt. 341; 35 Am. Rep. 705.....	162
Polydor v. Prince, 1 Ware, 402.....	522	Railroad Co. v. Woodcock, 18 Kans. 20.	399
Pomeroy v. Ainsworth, 22 Barb. 118....	579	Raines v. St. Louis, etc., Ry. Co., 71 Mo. 164; 36 Am. Rep. 459.....	684
Pomeroy v. Milwaukee R. Co., 13 Wis. 640.....	228	Rains v. Simpson, 50 Tex. 495; 82 Am. Rep. 609.....	189
Pond v. Makepeace, 2 Metc. 114.....	742	Rainwater v. Durham, 2 Nott & Mc Cord, 524.....	408
Pope v. Linn, 50 Me. 83.....	811	Raker v. Hull, 15 Iowa, 277.....	668
Pope v. Nickerson, 3 Story, 474.....	578	Ramsden v. Manchester, etc., Ry. Co., 1 Exch. 723.....	224
Popham v. Cole, 66 N. Y. 69; 2 C. C., 23 Am. Rep. 22.....	591	Ramsey's Adm'rs v. McCue, 21 Gratt. 349.....	264
Porter v. Doby, 2 Batoh. Rq. 49.....	263	Randall v. Johnson, R. I.....	241
Porter v. Hannibal & St. Jo. R. Co., 60 Mo. 100.....	428	Randle v. State, 49 Ala. 141.....	00
Porter v. Judson, 1 Gray, 175.....	303	Randolph v. Loughlin, 48 N. Y. 456....	542
Porter v. Nth. Mo. R. Co., 33 Mo. 128..	228	Randolph v. Randolph, 3 Rand. (Va.) 490.....	168
Potter v. Chic., Rock I. & Pacific R. Co., 46 Iowa, 344.....	199	Rankin v. Blackwell, 2 Johns. Cas. 198.	251
Potter v. Jacobs, 111 Mass. 32.....	851	Rankin v. Lay, 2 DeG., F. & J. 65.....	851
Potter v. Titcomb, 22 Me. 300.....	323	Rann v. Home Ins. Co., 59 N. Y. 387....	489
Potts v. Lazarus, 2 Car. Law, 83.....	635	Ransome v. Bentall, 3 L. J. (N. S.) Ch. 161.....	364
Potts v. Mayer, 74 N. Y. 504.....	495	Rape v. Heaton, 9 Wis. 323.....	586
Potts v. Port Carlisle Dock & Ry., 2 L. T. (N. S.) 283.....	249	Raphael v. Bank of England, 17 C. B. 161.....	298
Powell v. Penn. R. R. Co., 82 Penn. St. 414.....	652	Rawls v. Deshler, 3 Keys, 572.....	656
Powers v. Braggs, 79 Ill. 493.....	142	Rawstron v. Taylor, 33 Eng. L. & Eq. 423; 11 Exch. 360.....	243, 273
Prall v. Hamill, 28 N. J. Eq. 69.....	697	Ray v. Tubbs, 50 Vt. 683; 28 Am. Rep. 519.....	413
Prall v. Tilt, 23 N. J. Eq. 480, 483....	354, 698	Read v. Nash, 1 Wis. 305.....	157
Pratt v. Coman, 37 N. Y. 440.....	497	Read v. Simons, 2 Dessaus, 572.....	728
Pratt v. Gardner, 2 Cush. 68.....	187	Reader v. Kingham, 13 C. B. (N. S.) 344.....	164, 168
Pratt v. Gulick, 13 Barb. 297.....	505	Readman v. Conway, 126 Mass. 374....	246
Pratt v. Langdon, 97 Mass. 97.....	149	Reddos v. Galliard, 2 Dessaus, 552....	728
Pratt v. Whittier, Cal. S. C. 1881.....	475	Redmon v. Coffin, 2 Dev. Eq. 437....	638
Prentiss v. Ledyard, 28 Wis. 131.....	843	Reed v. Holcomb, 31 Conn. 360.....	166
Presbyterian Soc. v. R. Co., 3 Hill 547..	225	Reed v. Howard, 2 Metc. 39.....	239
Prescott v. Morris, 32 N. H. 101.....	413	Reed v. Northfield, 13 Pick. 94; 23 Am. Dec. 662.....	297
Pres't v. Hall, 6 N. J. 215.....	261	Reeve v. Liverpool Ins. Co., 39 Wis. 520.	149
Prevost v. Gratz, 1 Pet. Circ. 364.....	263	Reg. v. Buckley, 13 Cox's C. C. 250....	84
Price v. Gt. West. Ry., 16 M. & W. 244.	306	Reg. v. Edwards, 12 Cox's C. C. 220....	84
Price v. Hewitt, 8 Exch. 146.....	413	Reg. v. Pook, 14 Eng. (Moak) 625....	84, 88
Price v. Jones, 3 Head, 84.....	668		
Price v. Powell, 3 Comst. 322.....	576		
Pritchard v. Merchants & Tradesmen's Ass. Soc., 3 C. B. (N. S.) 622.....	319		

TABLE OF CASES CITED.

ixix

PAGE.	PAGE.
<i>Bag v. Walcott</i> , 28 Cox's C. C. 371	<i>Bald v. Matthews</i> , Kentucky Court of Appeals, Oct., 1881
<i>Bauman v. Beckman</i> , 25 N. Y. 625	<i>Baggies v. Patten</i> , 3 Mass. 420
<i>Bass & W. Plank Road v. Barton</i> , 20 N. Y. 400	<i>Burton v. People</i> , 48 N. Y. 212
<i>Baxter v. Powell</i> , 61 Ga. 20	<i>Bunnion v. Cruise</i> , 4 Blackf. 408
<i>Bhodes v. Cleveland</i> , 19 Ohio, 100	<i>Ranjan v. Mercereau</i> , 11 Johns. 437; 6 Am. Dec. 390
<i>Bhodes v. Gent</i> , 6 D. & A. 244	<i>Rose v. Fay</i> , 20 Vt. 281
<i>Biss v. Dewey</i> , 44 Barb. 435	<i>Russell v. Sloan</i> , 25 Vt. 619
<i>Biss v. Curtis</i> , 20 Vt. 404	<i>Russell v. Woodward</i> , 10 Pick. 403
<i>Biss v. Oulter</i> , 27 Wis. 201	<i>Ruter v. Foy</i> , 45 Iowa, 125
<i>Biss v. Hart</i> , 116 Mass. 201; 8 C. 10 Am. Rep. 422	<i>Ruth, In re</i> , 22 Iowa, 243
<i>Biss v. Pender</i> , 7 Fred. 220	<i>Safford, Ex parte</i> , 2 Lowell, 242
<i>Richardson v. Holmes</i> , 20 How. 145	<i>Sagony v. Dubois</i> , 2 Sandf. Ch. 468
<i>Richardson v. Raymond</i> , 22 Ill. 612	<i>Salisbury, Ex parte</i> , 2 Johns. Ch. 247
<i>Richardson v. Kute</i> , 25 Penn. 84	<i>Salmon v. Matthews</i> , 8 M. & W. 227
<i>Richardson v. Goddard</i> , 20 How. 25	<i>Sammon v. N. Y. & Harlem R. R.</i> , 48 N. Y. 211
<i>Richardson v. Gower</i> , 10 Rich. 200	<i>Sanders v. Gillespie</i> , 20 N. Y. 220
<i>Richardson v. Hughtis</i> , 75 N. Y. 15	<i>Sanders v. Pope</i> , 12 Ves. 222
<i>Richardson v. N. Y. C. R. Co.</i> , 25 Mass. 97	<i>Sanders v. Wilson</i> , 24 Vt. 318
<i>Richmond v. Sacramento Valley R. R. Co.</i> , 10 Cal. 261	<i>Sandford v. McLean</i> , 3 Paige, 228; 25 Am. Dec. 773
<i>Ridgway v. Eurbank</i> , 2 M. & R. 277	<i>Sandford v. Sanford</i> , 20 Conn. 8
<i>Ridgway v. Hungerford Market Co.</i> , 2 Ad. & El. 171	<i>Sands v. N. Y. Life Ins. Co.</i> , 20 N. Y. 420; 8 C. 10 Am. Rep. 235
<i>Ridgway v. Thompson</i> , 12 Bush. 210	<i>Sanger v. Upton</i> , 1 Otis, 88
<i>Ridgway v. Blane</i> , 10 Fed. 200	<i>Sargeant v. Rutta</i> , 21 Vt. 90
<i>Ridgway v. Bd. County Com. & Nob.</i> , 207	<i>Sargeant v. Essex Marine Ry.</i> , 9 Pick. 202
<i>Ridgway v. Smith</i> , 64 N. Y. 679	<i>Sargeant v. Metcalf</i> , 5 Gray, 101
<i>Ridgway v. Phillips</i> , 25 N. Y. 204	<i>Satterlee v. Matthews</i> , 13 L. & R. 100; 2 Pot. 200
<i>Ridgway v. Driscoll</i> , 20 Conn. 602	<i>Sauer v. Schulenberg</i> , 25 Md. 206; 8 Am. Rep. 174
<i>Robert v. New England Life Ins. Co.</i> , 1 Da. 266	<i>Savage v. O'Neil</i> , 41 N. Y. 224
<i>Roberts in re</i> , 14 Ch. Div. 20	<i>Savings Bank v. Adams</i> , 2 Conn. 97
<i>Robertson v. Erie R. R. Co.</i> , 25 Barb. 21	<i>Sawyer v. Hoy</i> , 1 Wal. 101; 1 Otis, 48
<i>Robertson v. Com. Ins. Co.</i> , 3 Sumn. 220	<i>Sayre v. Revue</i> , 1 N. J. 787
<i>Robinson v. Kinney</i> , 2 Kana. 104	<i>Sayre v. Wheeler</i> , 11 Wm. 11
<i>Robinson v. Lyons</i> , 1 P. F. Smith, 75	<i>Schafer v. Lane</i> , 4 Penn. 84
<i>Robinson v. Nesbitt</i> , L. R., 8 C. P. 204	<i>Schlichter v. 1</i> , 9 C. 17 Fed. 201
<i>Roby v. West</i> , 4 N. H. 205	<i>Schlosswald v. Metropolitan Savings Bank</i> , 27 N. Y. 412
<i>Roche v. Chaplin</i> , 1 Dall. 419	<i>School Dist v. McDonald</i> , 25 Iowa, 204
<i>Rochester v. Randall</i> , 105 Mass. 225; 7 Am. Rep. 229	<i>Schroeder v. Chic. Rock I. & Pacific R. Co.</i> , 41 Iowa, 244
<i>Rochester White Lead Co. v. Rochester</i> , 2 N. Y. 425	<i>Schulenberg v. Harriman</i> , 21 Wall. 44
<i>Rock v. Nichols</i> , 3 Allen, 361	<i>Scott v. Alford</i> , 53 Tex. 22
<i>Rodgers v. Burdard</i> , 8 Tex. 413; 7 Am. Rep. 225	<i>Scott v. DePuyter</i> , 1 Edw. Ch. 212, 248
<i>Rodgers v. Rodgers</i> , 1 Watts, 15	<i>Scott v. Key</i> , 11 La. Ann. 228
<i>Rodwell v. Rodger</i> , 1 C. & P. 220	<i>Scott v. Lord Hastings</i> , 4 K. & J. 222
<i>Rogers v. Crow</i> , 60 Miss. 81	<i>Scott v. Walker</i> , Dudley, 248
<i>Rogers v. Gilling</i> , 20 Penn. St. 105	<i>Scott v. Whitney</i> , 41 Wm. 404
<i>Rogers v. Orian</i> , 21 Iowa, 20	<i>Scovill v. Geddings</i> , 7 Ohio, 222
<i>Rogers Locomotive Works v. Lewis</i> , 4 Ill. 130	<i>Scrubham v. Carter</i> , 12 Wend. 121
<i>Rohner v. Knickerbocker Life Ins. Co.</i> , 2 N. Y. 100	<i>Scudder v. Union Nat. Bank</i> , 1 Otis, 412
<i>Rolle v. Rolle</i> , 10 Ga. 145	<i>Seart v. Lindsey</i> , 11 C. D. (N. S.) 412
<i>Roll v. Atlanta</i> , 24 Ga. 227	<i>Searle v. Keever</i> , 2 Kap. 222
<i>Roll v. Augusta</i> , 24 Ga. 225	<i>Seaver v. Boston & Maine R.</i> , 14 Gray 448
<i>Romo v. Omberg</i> , 25 Ga. 46	<i>Seaver v. Young</i> , 20 Vt. 612
<i>Ross v. G. W. R. Co.</i> , 43 N. Y. 608	<i>Sedgwick v. Laffin</i> , 10 Allen, 420
<i>Roper v. Clay</i> , 18 Mo. 204	<i>Seibert v. Lenton</i> , 5 W. Va. 57
<i>Ross v. Brotherton</i> , 16 Wend. 20	<i>Saizo v. Provencio</i> , L. R., 1 Ch. App. 102
<i>Ross v. Groves</i> , 5 Man. & Gr. 619	<i>Selma R. Co. v. Lacey</i> , 42 Ga. 441; 49 Ga. 104
<i>Ross v. Ross</i> , Amb. 222	<i>Selby v. Redton</i> , 10 Wm. 1
<i>Ross v. Ross</i> , 4 Wm. & Fh. 222	<i>Semmons v. Moseley</i> , 4 Cush. 87
<i>Ross v. Story</i> , 1 Barr. 100	<i>Sewall v. City of Cohos</i> , 13 N. Y. 43; 21 Am. Rep. 412
<i>Ross v. Ross</i> , 122 Mass. 212	<i>Sewall v. Roberts</i> , 115 Mass. 222
<i>Ross v. W. R. Co.</i> , 50 Ga. 511	<i>Sewall v. Sewall</i> , 122 Mass. 100; 25 Am. Rep. 222
<i>Rothbauer v. Staats</i> , 22 Wm. 422	<i>Seymour v. Continental Ins. Co.</i> , 44 Conn. 500; 25 Am. Rep. 422
<i>Rouch v. Gt. West. R. R. Co.</i> , 1 Q. B. 10	
<i>Rove v. Markett</i> , 25 Ind. 164	
<i>Rove v. Sharp</i> , 1 P. F. D. Smith, 22, 27	

	PAGE.		PAGE.
<i>Seymour v. C. & N. F. R. Co.</i> , 25 Barb. 406	410	<i>Smith v. Bull</i> , 17 Wend. 223	160
<i>Shaftsbury v. Arrowsmith</i> , 4 Ves. 96	430	<i>Smith v. Cheney</i> , 1 Hill (S. C.) 165	733
<i>Shamleffer v. Mill Co.</i> , 18 Kane 24	206	<i>Smith v. Cramer</i> , 20 Iowa, 423	168
<i>Shaver v. West. Un. Tel. Co.</i> , 57 N. Y. 459	419	<i>Smith v. Crescent City Co.</i> , 30 La. Ann. 1278	264
<i>Shaw v. Gould</i> , L. R., 3 H. L. 55	261, 263	<i>Smith v. Davies</i> , 7 C. & P. 307	147
<i>Shaw v. Lenke</i> , 1 Daly 407	472	<i>Smith v. Derr</i> , 34 Penn. St. 126	261
<i>Shaw v. Merchant's Nat. Bank of St. Louis</i> , 101 U. S. 547	606	<i>Smith v. Duoning</i> , 61 N. Y. 240	819
<i>Shaw v. Robberda</i> , 8 Ad. & E. 75	649	<i>Smith v. Hughes</i> , L. R., 6 Q. B. 407	406
<i>Shaw v. Spencer</i> , 100 Mass. 322	607	<i>Smith v. Kelly</i> , 23 Miss. 167	236
<i>Shawneetown v. Mason</i> , 23 Ill. 367	723	<i>Smith v. Lowell Mfg. Co.</i> , 124 Mass. 114	846
<i>Shearer v. State</i> , 7 Blackf. 90	146	<i>Smith v. Lyles</i> , 5 N. Y. 41	606
<i>Shedden v. Patrick</i> , 1 Macq. 535	205, 237	<i>Smith v. McGowan</i> , 1 Barb. 404	203
<i>Shoody v. Roach</i> , 124 Mass. 472; 20 Am. Rep. 680	371, 372	<i>Smith v. O'Connor</i> , 25 Wright, 213	700
<i>Shoen, Ex parte</i> , 63 L. T. (N. S.) 688	473	<i>Smith v. Salisbury</i> , 5 C. & P. 190	544
<i>Shoeta v. Seldon</i> , 7 Wall. 415	283	<i>Smith v. Stewart</i> , 83 N. C. 406	659
<i>Sheffield School Township v. Andrews</i> , 54 Ind. 157	140	<i>Smith v. Summerlin</i> , 48 Ga. 605	610
<i>Shelby v. Governor</i> , 2 Blackf. 229	202	<i>Smith v. Sykes</i> , Freeman 254	719
<i>Shelby v. Guy</i> , 11 Wheat. 357	550	<i>Smith v. Tracy</i> , 30 N. Y. 79	259
<i>Sheppard v. Earles</i> , 20 N. Y. Sup. Ct. 651; 13 Hun. 651	254	<i>Smith v. T. R. R. Co.</i> , 51 Mo. 588	395
<i>Sheridan v. Brooklyn, etc., R. Co.</i> , 38 N. Y. 39	712	<i>Smith v. Washington</i> , 20 How. 147	91
<i>Sherman v. H. R. R. Co.</i> , 64 N. Y. 254, 280	570, 580	<i>Smith v. Whitaker</i> , 21 Ill. 207	555
<i>Sherman v. Milwaukee R. Co.</i> , 40 Wis. 643	229	<i>Smith v. Whittingham</i> , 5 C. & P. 78	200
<i>Sherman v. Rawson</i> , 102 Mass. 409	448	<i>Smith v. Zent</i> , 50 Ind. 302	147
<i>Sherrill v. Hopkins</i> , 1 Cow. 103	606	<i>Smith Paper Co. v. Irvin</i> , Mass. S. C. 1891	474
<i>Shields v. Arndt</i> , 3 Green Ch. 204	243	<i>Smithurst v. Edmunds</i> , 14 N. J. Eq. 409	729
<i>Shields v. Young</i> , 15 Ga. 340	713	<i>Smithpeters v. Griffin</i> , 10 B. Monr. 209	426
<i>Shindler v. Houston</i> , 1 Denio, 22	19, 22	<i>Snelgrave v. Bally</i> , 3 Atk. 214	373
<i>Ship v. McGraw</i> , 2 Murph. 463	160	<i>Slaw v. Housatonic R. R. & A. Co.</i> , 441	340
<i>Shireman v. Jackson</i> , 14 Ind. 439	609	<i>Snyder v. Hannibal & St. Jo. R. R. Co.</i> , 40 Mo. 411	426
<i>Shook v. Brown</i> , 61 Penn. St. 230	304	<i>Smith v. Bk. of England</i> , 18 East, 115	209
<i>Shook v. Vanmeter</i> , 23 Wis. 622	166	<i>Southmayer v. De Barros</i> , 5 P. D. 04	222
<i>Slifers v. Lester</i> , 45 Miss. 256	480	<i>Southbridge Sav. Bk. v. Stevens Tool Co.</i> , Mass.	473
<i>Sullivan v. Cummins</i> , 13 Ohio, 110	200	<i>Southwestern R. Co. v. Singleton</i> , Ga.	605
<i>Silver v. Henderson</i> , 3 McL. 163	700	<i>Sowar v. Leggatt</i> , 7 C. & P. 612	145
<i>Simmonds v. Humble</i> , 12 C. B. (N. S.) 226	22	<i>Sparks v. Garrigue</i> , 1 Binn. 125	311
<i>Simonin v. Mallac</i> , 2 Sw. & Tr. 67	220	<i>Spaulding v. Rosa</i> , 71 N. Y. 40; 5 C. 27	506
<i>Simpson v. Eppinton</i> , 10 Ex. 645, 646	706	<i>Spears v. Crawford</i> , 14 Wend. 20; 20 Am. Dec. 511	214
<i>Simpson v. Nicholls</i> , 3 M. & W. 240, 244	810	<i>Spencer v. Field</i> , 10 Wend. 57	637
<i>Simpson v. Blackhouse</i> , 9 Barr. 126	253	<i>Spencer v. Maxfield</i> , 10 Wis. 541	310
<i>Singer v. Troutman</i> , 49 Barb. 126	600	<i>Spring v. Appeal</i> , 71 Penn. St. 11; 5 C. 10 Am. Rep. 654	549
<i>Singer Manuf. Co. v. Graham</i> , 5 Oreg. 17, 34 Am. Rep. 512	605	<i>Sperry v. Commonwealth</i> , 1 Bennett & Heard L. C. C. 44	643
<i>Sirrine v. Briggs</i> , 31 Mich. 442, 445	240, 264	<i>Spoford v. Norton</i> , 125 Mass. 538	378
<i>Sisone v. Dixon</i> , 5 B. & C. 758	147, 149	<i>Spooner v. Dunn</i> , 7 Ind. 81	162
<i>Skinner v. Dayton</i> , 2 Johns. Ch. 633; 10 Am. Dec. 205	600	<i>Spooner v. Holmes</i> , 102 Mass. 523	297
<i>Skinner v. Housatonic R. Co.</i> , 1 Cosh. 478	717	<i>Springfield v. Conn. River R.</i> , 4 Cosh. 63	225
<i>Skipp v. Harwood</i> , 2 Swanst. 606	240	<i>Springfield Bk. v. Merrick</i> , 14 Mass. 222	269
<i>Skottowe v. Young</i> , L. R., 11 Eq. 474	261	<i>St. John v. Eastern R. Co.</i> , 1 Allen, 644	149
<i>Skowhegan Bk. v. Cutler</i> , 49 Me. 515	54	<i>Stackpole v. Arnold</i> , 11 Mass. 27	620
<i>Skyles v. Dunbar</i> , 2 Wheat. Balw. N. P. 1070	673	<i>Stagg v. Pepson</i> , 1 N. & McC. 102	723
<i>Slade v. Nelson</i> , 20 Ga. 205	71	<i>Stalker v. McDonald</i> , 6 Hill, 22	405
<i>Slaymaker v. Gundacker's Exr.</i> , 10 B. & R. 75	480	<i>Staley v. Hendricks</i> , 10 Fred. 66	613
<i>Slade v. Payne</i> , 14 La. Ann. 253	576	<i>Starr v. Camden & Atlantic R. Co.</i> , 24 N. J. L. 592	222
<i>Slinger v. Henneman</i> , 20 Wis. 204	9	<i>State v. Auditor</i> , 38 Mo. 193	451
<i>Sloman v. Walter</i> , 1 Bro. Ch. 419	600	<i>State v. Austin</i> , 7 Wis. 306	547
<i>Small v. Herkimer Mfg. and Hydraulic Co.</i> , 2 Comst. 225	314	<i>State v. Bancroft</i> , 2 Kane 205	219
<i>Smart v. Williams</i> , 1 Balk. 300	626	<i>State v. Bass</i> , 2 N. C. 570	645
<i>Smith, In re</i> , 12 Johns. 122	240	<i>State v. Backwelder</i> , Phil. 38	644
<i>Smith v. Bean</i> , 15 N. H. 677	611	<i>State v. Bowditch</i> , 15 Vt. 412	289
<i>Smith v. Bettger</i> , 65 Ind. 204; 24 Am. Rep. 254	147	<i>State v. Bray</i> , 17 N. C. 253	644
<i>Smith v. Brady</i> , 17 N. Y. 179	504	<i>State v. Brighton</i> , 7 Fred. 96	674
		<i>State v. B. & G. N. C.</i> , 570	645
		<i>State v. Chandler v. Hawks</i> , 200	464
		<i>State v. Church</i> , 5 Or. 71, 30 Am. Rep. 79	422
		<i>State v. Court</i> , 1 Conn. P., 30 N. J. 73; 13 Am. Rep. 422	9
		<i>State v. Craton</i> , 6 Fred. 164	644

TABLE OF CASES CITED.

xxxi

	PAGE.		PAGE.
State v. Danforth, 68 Iowa, 43; 39 Am. Rep. 307	109	Sturdivant v. Hall, 69 Mo. 173	142
State v. Dickinson, 41 Wis. 220	97	Sturtevant v. Robinson, 30 Pick. 215	219
State v. Dula, Phil. 231	91	Stuyvesant v. Mayor of N. Y., 7 Cow. 609	299
State v. Edwards, 4 Humph. 228	81	Suffield Ecclesiastical Soc. v. Loomis, 48 Conn. 370	371
State v. Fennell, 10 Conn. 407	974	Sullivan v. M. & M. R. Co., 11 Iowa, 421	109
State v. Fullenwider, 4 Ired. 204	290	Sullivan v. Phil., etc., R. Co., 20 Penn. 234	622
State v. Grammar, 20 Ind. 301	303	Sullivan v. Union Pac. R. Co., 3 Dill. 224	710
State v. Grand Trunk Ry. Co., 68 Mo. 178; 4 Am. Rep. 304	710	"Sultana" v. Chapman, 5 Wis. 464	510
State v. Horn, 10 Mo. 420; 35 Am. Rep. 42	92	Summer v. Jones, 24 Vt. 237	300
State v. Howard, 20 Vt. 320	34	Summer v. Woods, 22 Ala. 94	607
State v. Johnson, 10 N. C. 120; 20 Am. Rep. 406	646	Superior v. Stout, 9 W. Va. 703	704
State v. Jaffer, 20 Iowa, 420	204	Sullivan v. Atwood, 15 Ohio St. 126	203
State v. Leach, 5 Ind. 300	426	Sutton v. Hayden, 22 Mo. 101	420
State v. Leckfeld, 68 Mo. 207	426	Sutton v. Sadler, 3 C. R. (U. S.) 97	149
State v. Lusk, 10 Mo. 225	461	Swan v. Crafts, 124 Mass. 459	391
State v. McCarty, 1 Day, 204	426	Swan v. Scott, 11 B. & L. 124	673
State v. McGinley, 4 Ind. 7	149	Swann v. Broome, 2 Burr. 1400	497
State v. McIntire, 1 Jones L. (N. C.) 1	426	Swann v. Patterson, 7 Md. 104	707, 709
State v. Martin, 10 Ark. 629	229	Sweeney v. Boston Five Cents Sav. Bk., 116 Mass. 334	372
State v. Morrishew, 67 Iowa, 118; 20 Am. Rep. 404	92	Sweeney v. Boster, 1 Wall. 105	99
State v. Munch, 20 Minn. 97	410	Sweeney v. Old Colony & Newport R. Co., 10 Allen, 222	222, 444
State v. Newton, 20 Ark. 270	226	Swenson v. Flow Co., 14 Kans. 307	276
State v. Norwood, 19 Md. 125	226	Swett v. Cotta, 10 N. H. 420; 9 Am. Rep. 276	247
State v. Offutt, 4 Blackf. 205	624	Swift v. Pierce, 15 Allen, 222	222
State v. Pike, 40 N. H. 220; 6 Am. Rep. 114	114	Swift v. Tyson, 10 Pet. 10	677
State v. Pittsburg, etc., R. Co., 45 Md. 41	110	Swinton Water Works Co. v. W. & R. Canal Co., L. R., 7 Eng. & Ir. App. 697	374
State v. Purdy, 20 Wis. 218; 17 Am. Rep. 413	413	Syracuse City Bank v. Davis, 15 Barb. 108	298
State v. Rhoades, 6 Nev. 222	222	Taintor v. Taylor, 20 Conn. 249; 4 Am. Rep. 25	25
State v. Shreve, 16 Iowa, 20	707	Talmadge v. Oliver, 14 B. C. 222	607
State v. Silver, 9 Nev. 207	426	Tangley, The, 1 C. R. 226	576
State v. Smith, 20 Mo. 230	226	Taylor v. Forbes, 2 Allen, 24	765
State v. Snyder, 20 Kans. 208	109	Tappan v. Maledoff, 5 N. H. 120	241
State v. Treston, 20 N. J. L. 67	210	Tarrant v. Webb, 14 C. B. 797	240
State v. Vincent, 24 Iowa, 670	67	Taverner's Case, 1 Dyer, 60	278, 280
State v. Wilcox, 43 Conn. 204; 19 Am. Rep. 226	9	Taylor v. Carpenter, 11 Pat. 222	100
Stearns v. Atlantic & St. L. R. R. Co., 45 Mo. 114	708	Taylor v. Columbia Ins. Co., 14 Allen, 222	221
Stearns v. Burnham, 5 Oranal. 221	708	Taylor v. Fickas, 66 Ind. 127; 31 Am. Rep. 114	102
Stearns v. Townsend, 27 Ala. 227	110	Taylor v. Fields, 4 Ven. 220	220
Steelman v. Matlin, 20 N. J. 227; 20 Am. Rep. 270	270	Taylor v. Johnson, 17 Ge. 621	216
State v. Burdon, 24 Ala. 120	220	Taylor v. Little Rock, M. R. & L. R. R. Co., 22 Ark. 220	49
Steinbaker v. Wilson, 1 Leg. Gen. 78	679	Taylor v. Mosley, 6 C. & B. 370	220
Stevens v. Sherier, 40 Wis. 64; 20 Am. Rep. 72	220	Taylor v. Taylor, 64 Ind. 220	107
Stevens v. Gaylord, 11 Mass. 207	748	Taylor v. Tucker, 1 Kelly, 222	71
Stevens v. Martin, 10 Penn. St. 220	220	Tell v. Sevier, 20 Tex. 616	207
Stevens v. Sullivan, 5 Wheat. 207	220	Tell v. Patton, 1 N. Y. 227	616
Stewart v. Kearney, 5 Watts, 420	679	Teller v. Northern R. Co., 20 N. J. L. 120	710
Stikemas v. Dawson, 1 De G. & L. 60	416	Tennant v. Fitzgerald, 5 B. & Ald. 600	15
Storking v. Sage, 1 Conn. 519	160	Terry v. Wheeler, 25 N. Y. 220	641
Stockwell v. Hunter, 1 Mete. 420	220	Texas & Pacific Ry. Co. v. Murphy, 40 Tex. 220; 25 Am. Rep. 272	220
Stohely v. Thompson, 24 Penn. St. 220	210	Thayer v. Rockwell, 4 Col. 576	220
Stokes v. Saltoustaill, 12 Pet. 121	227	Thayer v. Daniels, 124 Mass. 120	224
Stone v. Perry, 40 Mo. 40	620	Thayer v. Middlesex Ins. Co., 10 Pick. 220	210
Stoner v. Bille, 5 Ind. 121	220	Thomas v. Board of Education, 13 Ill. 220	220
Story v. Lovett, 1 S. D. Smith, 125	620	Thomas v. Commonwealth, 2 Robin-son (Va.) 706	674
Stout v. City F. Ins. Co., 10 Iowa, 271	613	Thomas v. Cook, 5 B. & C. 220	104, 105
Stout v. Wood, 5 Blackf. 71	120	Thomas v. Winters, 12 Ind. 220	620
Stow v. Wood, 1 Cow. 425	620	Thompson v. Morgan, 6 Minn. 220	220
Stranger v. Sears, 1 Rep. N. P. C. 14	344	Thompson v. Pichel, 20 Iowa, 420	310
Strathmore Peasage Case, 4 Wils. & Ld. Appx. 2	220	Thompson v. Whitman, 15 Wall. 423	31
Strickler v. Burkholder, 47 Penn. St. 67	140		
Strong v. Blanchard, 4 Allen, 425	124		
Strong v. Houston R. Co., 10 Rep. 22	624		
Stuart v. School Directors, 20 Mich. 60	120		
Sturdivant v. Shepter, 24 N. Y. 240	413		

	PAGE.		PAGE.
Thompson v. Lee County, 3 Wall. 297	297	Van Buren v. Ormsted, 5 Paige, 9	106
Thurston v. St. Joseph, 31 Mo. 420; 11 Am. Rep. 425	420	Vall v. Durant, 7 Allen, 420	420
Tibbatts v. Towle, 13 Mo. 241	241	Van Corlandt v. Underhill, 77 Johns. 400	407
Tift v. Towne, 40 Ga. 47	47	Vanderbilt v. Eagle Iron Works, 35 Wend. 400	400
Tilden v. Blair, 21 Wall. 241	241	Vanderburgh v. Hull, 40 Wend. 70	70
Tillingham v. Wheaton, 3 R. L. 505; 5 Am. Rep. 507	505	Vandike v. Roskams, 37 Penn. St. 260	261
Tillock v. Webb, 46 Mo. 100	100	Van Hook v. Walton, 30 Tex. 20	20
Tilston v. Smith, 33 N. H. 90	90	Van Hornes v. Iverness, 2 Dall. 200	200
Tilman v. Stricker, 30 Ga. 173	173	Van Keuren v. Perkins, 45 N. Y. 77	77
Tilman v. Walkup, 7 S. C. 60	60	Van Riper v. Raper, 40 Wend. 434	434
Tinney v. Midland Ry., L. R., 1 Q. P. 200	200	Van Schoelk v. Niagara Fire Ins. Co., 1 N. Y. 43	43
Tippett v. Walker, 4 Mass. 105	105	Van Vakenburgh v. Ins. Co., 30 N. Y. 400	400
Tirrell v. Bacon, 5 Fed. Rep. 65	65	Vaughan v. Haldeman, 30 Penn. St. 222	222
Todd v. Lee, 15 Wis. 225	225	Vaughn v. Hopsen, 10 Bush, 319	319
Todd v. Old Colony R. Co., 7 Allen, 307	307	Vermilye v. Adams Ex. Co., 31 Wall. 136	136
Tome v. Parkersburg R. Co., 30 Md. 35, & C. Am. Rep. 345	345	Verner v. Sweetser, 4 Casey, 220	220
Tomlinson v. Gill, Amb. 100	100	Vidal v. Commagire, 13 La. Ann. 516	516
Tompkins v. Dudley, 30 N. Y. 375	375	Viole v. Germania Ins. Co., 30 Iowa, 9	9
Toole v. Clifton, 25 Ohio St. 247; 10 Am. Rep. 252	247	Village of Buffalo v. Webster, 10 Wend. 100	100
Toplis v. Grana, 4 Bing. (N. C.) 405	405	Vincent v. Germond, 11 Johns. 222	222
Towanda Coal Co. v. Hoeman, 30 Penn. St. 418	418	Vivian v. Otis, 24 Wis. 513; 1 Am. Rep. 100	100
Towne v. Fiske, 137 Mass. 125; 34 Am. Rep. 203	125	Vogel v. Mollus, 35 Wis. 310; 11 Am. Rep. 625	310
Town of Ottawa v. Perkins, 34 U. S. 200	200	Voris v. Sloan, 30 Ill. 209	209
Towsend v. Hubbard, 4 Hill, 351	351	Waddell v. Cook, 2 Hill (N. Y.), 47	351
Transportation Co. v. Chicago, 30 U. S. 320	320	Waffey v. N. Y. C. & H. R. Co., 30 Barb. 415; 35 N. Y. 11; 12 Am. Rep. 407	415
Treadgill v. McLendon, 70 N. C. 36	36	Walt v. Green, 30 N. Y. 525	525
Treadwell v. Brown, 43 N. H. 200	200	Walte v. Walte, 30 Vt. 200	200
Treasurers v. Bates, 3 Ball 225	225	Wakefield v. Martin, 3 Mass. 500	500
Treat v. Lord, 43 Me. 502	502	Wambold v. Vick, Wis. S. C.	510
Trimmer v. Boyne, 7 Vm. 505	505	Walch v. Young, 110 Mass. 305	311
Trimmer v. Thomson, 10 S. C. 100	100	Walcott v. Van Santvoord, 17 Johns. 245, & Am. Dec. 200	245
Trimston v. Hamill, 1 Hall & H. 379	379	Waldron v. Haupt, 2 P. P. Smith, 400	400
Trinity Church v. Higgins, 4 Rob. 1	1	Walker v. Ruston & Maine R. R., 125 Mass. 8	245
Troy City Bank v. Grant, Hill & Denio, 119	119	Walker v. Pitts, 34 Pick. 101	241
Trustees v. McCaughy, 2 Ohio St. 100	100	Walker v. Moore, 125 Mass. 200	200
Trustees, etc., v. Rautenberg, 35 Ill. 125	125	Walker v. Vaughan, 30 Conn. 377	377
Tucker v. Aiken, 7 N. H. 140	140	Walker v. Vincent, 10 Penn. St. 200	200
Tucker v. Mowrey, 12 Mich. 375	375	Walkill Overseers v. Mamakating, 14 Johns. 57	706
Tuckerman v. Hinkley, 6 Allen, 454	454	Wallace v. Attorney-General, L. R., 1 Ch. 1	200
Turner v. Hayden, 4 B. & D. 1	1	Wallace v. McConnell, 10 Pat. 125	735
Tutt v. Hobbs, 17 Mo. 400	400	Wall v. Hines, 7 Gray, 206	475
Twinnley v. Cent. Park, etc., R. Co., 30 N. Y. 125, 35 Am. Rep. 102	102	Wall v. Hoskins, 5 Ired. 17	160
Tyler v. Wilkinson, 4 Mason, 307	307	Wall v. Provident Inst. for Savings, 3 Allen, 60	375
Udny v. Udny, L. R., 1 H. L. 541	541	Waller v. Southeastern Ry., 2 R. L. & C. 102	245
Underbank v. Commonwealth, 70 Penn. St. 310	310	Walter v. Brown, 3 Mass. 400	500
Union Inst. for Savings v. Boston, 120 Mass. 22	22	Walter v. C. R. L. & P. R. Co., 41 Iowa, 71	701
Union Water Co. v. Murphy, 30 Col. 621	621	Walters v. Short, 10 Ill. 225	200
U. S. v. Boyd, 5 Bow. 50	50	Ward v. Central Park, etc., R. Co., 11 Abb. N. S. 411 & 42 How. Fr. 200	715
U. S. v. Crosby, 7 Cr. 115	115	Ward v. Kilpatrick, N. Y. Ct. App.	475
U. S. v. Catta, 1 Sumn. 123	123	Ward v. Larnau, 5 Pick. 255	200
U. S. v. Eckford's Ex'rs, 1 How. 370	370	Ward v. Mayor, etc., of Granville, 16 Baxt. 225; 25 Am. Rep. 702, note, 705	505
U. S. v. Girault, 11 How. 26	26	Ward v. Turner, 2 Ven. Ren. 421	575
U. S. v. Linn, 1 Bow. 104	104	Waring v. Edmonds, 11 Md. 494	373
U. S. v. Vaughan, 3 Binney, 204	204	Warner v. Jull, 4 Mich. 600	311
U. S. Bank v. Chapin, 3 Wend. 471	471	Warner Co. v. Ward, 21 Iowa, 84	271
U. S. Trust Co. Rec'r v. Harris, 3 Bow. 75	75	Warren v. Fitchburg R. R. & Allen, 207	220
Unity Joint Stock Bank Assoc., Ex parte, 3 De G. & J. 60	60	Warren v. Layton, 4 Harring. 404	702
Uwinn v. Hoyer, 1 M. & Cr. 747	747	Warrander v. Warrander, 2 Cl. & Sta. 40	200
Upton v. Tribilcock, 1 Otto, 45	45		
Van Heuren v. Van Gansbeek, 4 Orw. 47	47		
Van Henschooten v. Lawau, 4 Johns. Ch. 313; 10 Am. Dec. 200	411		

TABLE OF CASES CITED.

xxxii:

	PAGE.		PAGE.
Washburn v. Franklin, 35 Barb. 909 ..	308	Whiting v. Independent Mut. Ins. Co., 15 Md. 814 ..	795
Washburn v. Nashville & Chattanooga R. R. Co., 3 Head, 638 ..	658	Whiting v. Sullivan, 7 Mass. 107 ..	304
Watervliet Bk. v. White, 1 Denio, 608 ..	878	Whitney v. State Bank, 7 Wis. 690 ..	829
Watkins v. Brant, 46 Wis. 419 ..	838	Whittaker v. West Boylston, 97 Mass. 273 ..	207
Watson v. Mercer, 8 Pet. 28 ..	308	Whitworth v. Gangain, 3 Hare, 416 ..	496
Watson's Exr. v. Pleasant Township, 21 Ohio St. 686 ..	784	Whyman v. Gath, 8 Exch. 808 ..	627
Watts v. Porter, 3 E. & B. 743 ..	305	Wickes v. Canik, 5 Harr. & J. 56 ..	268
Waugh v. Carver, 2 H. Bl. 235 ..	829	Wicks v. Mitchell, 9 Kana. 80 ..	822
Waukon & Miss. R. R. Co. v. Dwyer, 49 Iowa, 121 ..	214	Wilbur v. Johnson, 58 Mo. 600 ..	448
Way v. Butterworth, 106 Mass. 75 ..	674	Wild v. Armsby, 6 Cush. 814 ..	263
Weaver v. Backart, 2 Harr. 82 ..	449	Wildes v. Dudlow, L. R., 19 Eq. Cas. 198 ..	164, 168
Weaver v. Barden, 49 N. Y. 286 ..	495	Wilder v. Ritchie, 117 Mass. 382 ..	828
Webb v. Anspach, 3 Ohio St. 522 ..	250	Wiles v. Maddox, 26 Mo. 77 ..	289, 240
Weber v. N. Y. C. R. Co., 38 N. Y. 459 ..	443	Wilkes v. Back, 2 East, 142 ..	686
Webster v. Anderson, 42 Mich. 554; 38 Am. Rep. ..	21	Wilkes v. Ferris, 5 Johns. 835 ..	16
Webster v. McKinstater, 1 Pin. 644 ..	847	Wilkinson v. Verity L. R., 6 C. P. 206, 209 ..	571
Webster v. Wyster, 1 Stew. (Ala.) 184 ..	795	Williams v. Bayley, 14 L. T. (N. S.) 802 ..	204
Weed v. Donovan, 114 Mass. 121 ..	808	Williams v. Briggs, 11 R. I. 476; 28 Am. Rep. 518 ..	726
Weigand v. Stichel, 4 Abb. Ct. App. Dec. 502 ..	626	Williams v. Controllers, 18 Penn. St. 275 ..	190
Welch v. Moffat, 1 T. & C. 575 ..	505	Williams v. Crary, 5 Cow. 368; s. c., 4 Wend. 449 ..	557
Wellauer v. Fellows, 48 Wis. 105 ..	841	Williams v. Fireman's Fund Ins. Co., 54 N. Y. 569; 13 Am. Rep. 620 ..	650
Wells v. Mayor, 43 Ga. 67 ..	91	Williams v. East India Co., 3 East, 192 ..	147, 148
Wells v. Padgett, 8 Barb. 828 ..	449	Williams v. Evans' Admr., 39 Mo. 201 ..	21
Wells v. Tucker, 3 Binn. 306 ..	373	Williams v. N. Y. C. R. Co., 16 N. Y. 97 ..	224, 226
Welsh v. Usher, 2 Hill Ch. 167 ..	728	Williams v. Paul, 6 Bing. 653 ..	809
West Baylston Manf. Co. v. Searle, 15 Peck. 225 ..	358	Williams v. Triplet, 5 Iowa, 518 ..	737
West Cambridge v. Lexington, 1 Peck. 506; 11 Am. Dec. 231 ..	324	Williams v. Urnston, 35 Ohio St. 296; 35 Am. Rep. 611 ..	817
West Chester & Philadelphia R. Co. v. McElwee, 5 P. F. Smith, 239; 17 P. F. Smith, 311 ..	652, 712	Williams v. Williams, 1 Sim. (N. S.) 358 ..	573
Westerlo v. De Witt, 36 N. Y. 340 ..	373	Willet v. Shepard, 32 Mich. 106 ..	263
Westerman v. Means, 12 Penn. St. 97 ..	676	Willing v. Peters, 12 S. & R. 177 ..	688
Western Bank v. Duglass, 11 Sess. Cas. (3d series) 112 ..	549	Willis v. Germania Ins. Co., 79 N. C. 285 ..	651
Westmore v. Greenbank, Willes, 577 ..	787	Willis v. Hanover & Germania Fire Ins. Co., 79 N. C. 285 ..	649
Westoby v. Day, 2 E. & B. 605 ..	354	Wills v. Lynn & Boston R. R. Co., 129 Mass. 351 ..	710
Wetherell v. Gorman, 74 N. C. 603 ..	629	Wills v. Stradling, 3 Ves. Jr. 378 ..	851
Whitcomb v. Joselyn, 51 Vt. 79; 31 Am. Rep. 678 ..	413	Wilmot v. Richardson, 6 Duer, 328 ..	830
Whalen v. Layman, 2 Blackf. 194 ..	449	Wilson v. Foot, 11 Metc. 285 ..	603
Wheat v. Arnold, 36 Ga. 480 ..	262	Wilson v. Hardesty, 1 Md. Ch. 66 ..	396
Wheatley v. Baugh, 25 Penn. St. 528 ..	270, 273	Wilson v. Marsh, 2 Beas. 239 ..	310
Wheeler v. American Central Ins. Co. 6 Mo. App. 25 ..	649	Wilson v. Mayor, 1 Den. 595 ..	91, 764
Wheeler v. Com. Mut. Ins. Co., 32 N. Y. 543 ..	601	Wilson v. Merry, L. R., 1 H. L. Sc. 326 ..	344, 346
Wheeler v. Constantine, 39 Mich. 62; s. c., 33 Am. Rep. 355 ..	586	Wilson v. New Bedford, 108 Mass. 265; 11 Am. Rep. 352 ..	270
Wheeler v. Guild, 20 Pick. 545 ..	299, 301	Wilson v. Nth. Pacific R. Co., 26 Minn. 278 ..	386
Whetstone v. Bowser, 29 Penn. St. 59 ..	278	Wilson's Trusts, L. R., 1 Eq. 247 ..	833
White v. Friedlander, 35 Ark. 52 ..	585	Wilson v. Middlesex R. R., 107 Mass. 106; 9 Am. Rep. 11 ..	425, 712
White v. Hass, 32 Ala. 420 ..	200, 262	Winchester v. Corinna, 55 Me. 9 ..	397
White v. Hunter, 23 N. H. 128 ..	422	Winckworth v. Mills, 2 Esp. 484 ..	164
White v. Jones, 38 Ill. 160 ..	239	Wing v. Gluck, Iowa S. C. 1881 ..	142
White v. Maxey, 64 Mo. 552 ..	718	Winn v. Southgate, 17 Vt. 355 ..	842
White v. Morton, 22 Vt. 15 ..	241	Winslow v. Merchants' Ins. Co., 4 Metc. 306, 311 ..	435, 472
White v. Spettigue, 13 M. & W. 603 ..	717	Winter v. Belmont Mining Co., 53 Cal. 428 ..	354
White's Bank v. Myles, 73 N. Y. 835 ..	519	Withers v. North Kent Ry. Co., 3 H. & N. (Am. ed.) 989; 27 L. J. Ex. 417 ..	746, 748
White's Ex'rs. v. White, 30 Vt. 338 ..	167	Witherspoon v. Carrie, L. R., 5 Eng. & Ir. App. ..	508, 196
White Mt. R. R. v. Eastman, 34 N. H. 124 ..	136, 138	Witt v. Amis, 1 B. & L. 109 ..	373
Whitehead v. Reddick, 12 Ired. 95 ..	658	Wolf v. Howes, 20 N. Y. 197 ..	596
Whitehead v. Woolfolk, 3 La. Ann. 43 ..	252	Wolfe v. Railroad, 15 B. Monr. 404 ..	226
Whitehouse v. Fellows, 100 Eng. C. L. 765 ..	571	Womack v. McQuarry, 28 Ind. 108 ..	379, 239
Whitemore v. Farley, Eng. App. 1881 ..	204		
Whitfield v. Collingwood, 2 C. & R. 825 ..	262		
Whitford v. Panama R. Co., 23 N. Y. 695 ..	160, 580		
Whiting v. City Bank, 77 N. Y. 363 ..	378		

	PAGE.		PAGE.
Wood's Appeal, 10 Rep. 125.....	354	Wyatt v. Citizen's R. R. Co., 55 Mo. 435, 385	
Wood v. Northwestern Ins. Co., 46 N. Y. 421.....	469	Wyatt v. Williams, 43 N. H. 108.....	713
Wood v. Vance, 1 N. & McC. 197	414		
Woodard v. M. L. & N. L. R. Co., 10 Ohio St. 121.....	160	Yale v. Dederer, 13 N. Y. 235; 23 N. Y. 450; 38 N. Y. 329.....	819, 823
Woods v. North, 3 Norris, 407; 34 Am. Rep. 201.....	606, 678	Yates v. Lansing, 5 Johns. 222.....	157
Woodward v. Lazar, 31 Cal. 443.....	196	Yates v. Milwaukee, 10 Wall. 427.....	401
Woodward v. Mich., etc., R. Co., 10 Ohio St. 121.....	718	Young v. Thompson, 3 Kans. 83....	314
Woolsey v. Brown, 74 N. Y. 83.....	319	Young v. Wright, 4 Wis. 144.....	399
Worcester v. Eaton, 11 Mass. 378; 7 Am. Dec. 155.....	422	Youngs v. Lee, 12 N. Y. 551.....	496
Workman v. Wright, 33 Ohio St. 405; 31 Am. Rep. 646.....	704	Zachrisson v. Poppe, 3 Bosw. 171....	21
Wright v. N. Y. C. & H. R. Co., 25 N. Y. 562.....	452	Zeigler v. Day, 123 Mass. 159.....	345
Wright v. Remington, 12 Vroom, 48; 33 Am. Rep. 180.....	322	Zenipe v. Wilmington, 9 Rich. 84.....	150
Wrights' Trust, 2 K. & J. 596.....	338	Zinn v. N. J. St. Co., 49 N. Y. 443; s. c., 10 Am. Rep. 432.....	476
Wright v. Willis, 2 Allen, 191.....	370	Zipcey v. Thompson, 1 Gray, 248.....	361
Wright v. Wright, 1 Cow. 596....	372	Zirkel v. Joliet Opera House Co., 79 Ill. 334.....	137
		Zook v. Simonson, 73 Ind. 86.....	180
		Zuchtman v. Roberts, 109 Mass. 88; 12 Am. Rep. 663.....	696

CASES OVERRULED, DOUBTED AND DENIED.

- Adams v. Gay** (19 Vt. 358), denied ; **Troewert v. Decker** (51 Wla. 46), 810.
- Adams v. Way** (38 Conn. 419), doubted ; **Union Institution for Savings v. City of Boston** (129 Mass. 82), 810.
- Babcock v. U. S.** (3 Dill. 567), denied ; **Ex parte Brown** (72 Mo. 88), 483.
- Baldwin v. N. Y. Life Insurance Co.** (3 Bosw. 580), denied ; **Wheeler v. Conn. Mut. L. Ina. Co.** (82 N. Y. 548), 598, 599.
- Barnard v. Eaton** (2 Cush. 294), denied ; **Wright v. Bircher's Exr.** (72 Mo. 179), 435.
- Barnum v. Barnum** (42 Md. 251), doubted ; **Ross v. Ross** (129 Mass. 248), 836.
- Banta v. Garmo** (1 Sandf. 884, 886), denied ; **Neely v. Jones** (16 W. Va. 625), 795.
- Beckwith v. Hartford, etc., R. Co.** (29 Conn. 268), doubted ; **Union Institution for Savings v. City of Boston** (129 Mass. 82), 810.
- Bell v. Mayor of New York** (10 Pai. 49), denied ; **Union Institution for Savings v. City of Boston** (129 Mass. 82), 811.
- Bowlsby v. Speer** (31 N. J. 851), denied ; **Gilliston v. City of Charleston** (16 W. Va. 282), 768.
- Brewster v. Wakefield** (22 How. 118), denied ; **Union Institution for Savings v. City of Boston** (129 Mass. 82), 812.
- Brush v. Carpenter** (6 Ind. 78), overruled ; **Anderson v. Spence** (72 Ind. 220) 164.
- Buckhout v. Swift** (27 Cal. 483), denied ; **Patton v. Moore** (16 W. Va. 428), 792.
- Burnhisel v. Furman** (22 Wall. 170), denied ; **Union Institution for Savings v. City of Boston** (129 Mass. 82), 813.
- Capen v. Crowell** (66 Me. 282), denied ; **Union Institution for Savings v. City of Boston** (129 Mass. 82), 814.
- Carr v. Northern Liberties** (35 Penn St. 328), denied ; **Gillison v. City of Charleston** (16 W. Va. 282), 767.
- Carter v. Jones** (5 Ire. Eq. 196), denied ; **Neely v. Jones** (16 W. Va. 625), 798.
- City of Atchison v. Challis** (9 Kana. 608), denied ; **Gillison v. City of Charleston** (16 W. Va. 282), 767.
- City of Bangor v. Lansil** (51 Me. 251), denied ; **Gillison v. City of Charleston** (16 W. Va. 282), 767.
- Clark v. City of Wilmington** (5 Har. 248), denied ; **Gillison v. City of Charleston** (16 W. Va. 282), 766.

xxxvi CASES OVERRULED, DOUBTED AND DENIED.

- Codman v. Freeman** (8 Cush. 306), denied; **Wright v. Bircher's Exr.** (72 Mo. 179), 435.
- Commonwealth v. Green** (17 Mass. 589), denied; **State v. Foley** (15 Nev. 64), 464.
- Dickinson v. Canal Co.** (7 Exch. 280), overruled; **City of Emporia v. Soda** (25 Kans. 589), 271.
- Dodson v. Harris** (10 Ala. 566), denied; **Troewert v. Decker** (51 Wis. 46), 811.
- Doe v. Vardill** (5 B. & C. 438; 2 Cl. & Fin. 571; 7 id. 895), denied; **Ross v. Ross** (129 Mass. 243), 833.
- Douglass v. Fagg** (8 Leigh, 601, 602), denied; **Neely v. Jones** (16 W. Va. 625) 795.
- Duran v. Ayer** (67 Me. 145), denied; **Union Institution for Savings v. City of Boston** (129 Mass. 82), 313.
- Eaton v. Boissonnault** (67 Me. 540; 24 Am. Rep. 52), denied; **Union Institution for Savings v. City of Boston** (129 Mass. 82), 313.
- Flagg v. City of Worcester** (18 Gray, 601), denied; **Gillison v. City of Charleston** (16 W. Va. 282), 765.
- Ford v. Munroe** (20 Wend. 210), doubted; **Edgar v. Castello** (14 S. C. 20), 714, 715.
- Gage v. City of Chicago** (2 Bradw. 332), overruled; **Boone County v. Jones** (54 Iowa, 699), 232, 233.
- Yale v. Dederer** (22 N. Y. 450), denied; **Krouskop v. Shontz** (51 Wis. 204), 819.
- Gannon v. Hargadon** (10 Allen, 106), denied; **Gillison v. City of Charleston** (16 W. Va. 282), 768.
- Gardner v. McEwen** (19 N. Y. 125), denied; **Wright v. Bircher's Exr.** (72 Mo. 179), 435.
- Gray v. Briscoe** (6 Bush, 687), denied; **Union Institution for Savings v. City of Boston** (129 Mass. 82), 314.
- Greely v. Maine Cent. R. Co.** (53 Me. 200), denied; **Gillison v. City of Charleston** (16 W. Va. 282), 765.
- Green v. Creswell** (10 Ad. & El. 453), denied; **Anderson v. Spence** (72 Ind. 220), 164.
- Hamilton v. Van Rensselaer** (43 N. Y. 244), doubted; **Union Institution for Savings** (129 Mass. 82), 311.
- Head v. Goodwin** (37 Me. 187), denied; **Wright v. Bircher's Exr.** (72 Mo. 179), 435.
- Holden v. Trust Co.** (100 U. S. 72), denied; **Union Institution for Savings v. City of Boston** (129 Mass. 82), 313.
- Hubbard v. Callahan** (42 Conn. 524; 19 Am. Rep. 564), doubted; **Union Institution for Savings v. City of Boston** (129 Mass. 82), 310.
- Inhabitants of Franklin v. Fisk** (13 Allen, 211), denied; **Gillison v. City of Charleston** (16 W. Va. 282), 768.
- In re Roberts** (14 Ch. Div. 39), denied; **Union Institution for Savings v. City of Boston** (129 Mass. 82), 310.
- Jacobus v. St. Paul & Chicago R'y Co.** (20 Minn. 125; 18 Am. Rep. 360), denied; **Pennsylvania R. Co. v. Langdon**, 92 Penn. St. 21), 659.

CASES OVERRULED, DOUBTED AND DENIED. xxxvii

- Johnson v. Carpenter* (7 Minn. 176), doubted ; *Burhans v. Hutcheson* (25 Kans. 625), 276.
- Johnson v. Humboldt Ins. Co.* (91 Ill. 92; 33 Am. Rep. 47), denied; *Barber v. F. & M. Ins. Co. of Wheeling* (16 W. Va. 656), 801.
- Jones v. Richardson* (10 Metc. 488), denied ; *Wright v. Bircher's Exr.* (72 Mo. 179), 435.
- Langston v. So. Car. Railroad* (2 S. C. 248), denied; *Union Institution for Savings v. City of Boston* (129 Mass. 82), 113.
- Lash v. Lambert* (15 Minn. 416; 3 Am. Rep. 142), denied; *Union Institution for Savings v. City of Boston* (129 Mass. 82), 113.
- Leake v. Gilchrist* (2 Dev. 75), denied ; *Dial v. Fary* (14 s. c., 573), 741.
- Ladick v. Huntsinger* (5 W. & S. 51), denied ; *Union Institution for Savings v. City of Boston* (129 Mass. 82), 312.
- Lann v. Thornton* (1 M. G. & S. C. 379), denied; *Wright v. Bircher's Exr.* (72 Mo. 179), 435.
- McHugh v. Schuylkill County* (67 Penn. St. 391; 5 Am. Rep. 445), doubted ; *Shialer v. Vandike* (92 Penn. St. 447), 702.
- Mills v. City of Brooklyn* (32 N. Y. 489), denied; *Gillison v. City of Charleston* (16 W. Va. 782), 765.
- Moody v. Wright* (13 Metc. 17), denied ; *Wright v. Bircher's Exr.* (72 Mo. 179), 435.
- Moreland v. Lawrence* (23 Minn. 84), denied ; *Union Institution for Savings v. City of Boston* (129 Mass. 82), 113.
- Newton v. Kennerly* (31 Ark. 626), denied ; *Union Institution for Savings v. City of Boston* (129 Mass. 82), 313.
- Norway Plains Co. v. B. & M. R. R. Co.* (1 Gray 263), denied; *Faulkner v. Hart* (82 N. Y. 413), 577, 578
- Oda v. Sill* (8 Barb. 106), denied ; *Wright v. Bircher's Exr.* (72 Mo. 179), 435.
- Paine v. Caswell* (68 Me. 80; 28 Am. Rep. 21), denied ; *Union Institution for Savings v. City of Boston* (129 Mass. 82), 314.
- Parks v. City of Newburyport* (10 Gray, 28), denied. *Gillison v. City of Charleston* (16 W. Va. 282), 768.
- Pearce v. Hennessy* (10 R. I. 223), denied ; *Union Institution for Savings v. City of Boston* (129 Mass. 82), 113.
- Pierce v. Rowe* (1 N. H. 179) overruled ; *Union Institution for Savings v. City of Boston* (129 Mass. 82), 311.
- People v. Knapp* (42 Mich. 247; s. c. 35 Am. Rep. 438), denied ; *Gainey v. People* (97 Ill. 270), 110.
- Plummer v. Webb* (1 Ware, 80), doubted ; *Edgar v. Castello* (14 S. C. 20), 714, 715
- Rice v. Hunt* (118 Mass. 201; 19 Am. Rep. 433), denied ; *Faulkner v. Hart* (82 N. Y. 413), 577, 578.
- Rilling v. Thompson* (12 Bush, 310), denied ; *Union Institution for Savings v. City of Boston* (129 Mass. 82), 113.
- Ritter v. Phillips* (53 N. Y. 586), doubted ; *Union Institution for Savings v. City of Boston* (129 Mass. 82), 311.
- Robinson v. Kinney* (2 Kans. 184), denied ; *Union Institution for Savings v. City of Boston* (129 Mass. 82), 313.

XXXVII: CASES OVERRULED, DOUBTED AND DENIED.

- Boll v. City of Augusta** (34 Ga. 326), denied ; **Gillison v. City of Charleston** (16 W. Va. 282), 766.
- Sandford v. McLean** (8 Pai. 122), denied ; **Neely v. Jones** (16 W. Va. 625), 795.
- Seymour v. Continental Ins. Co.** (44 Conn. 300; 26 Am. Rep. 469), doubted ;
Union Institution for Savings v. City of Boston (129 Mass. 82), 311.
- Shaver v. Western Union Tel. Co.** (57 N. Y. 459), doubted ; **Brill v. Tuttle** (81 N. Y. 454), 519, 520.
- Smith v. Dew** (34 Penn. St. 126), denied ; **Ross v. Ross** (129 Mass. 243), 336.
- Smith v. Kelly** (23 Miss. 167), doubted ; **Ross v. Ross** (129 Mass. 243), 335.
- Sperling's Appeal** (71 Penn. St. 11 ; 10 Am. Rep. 684), denied ; **Hun v. Cary** (82 N. Y. 65), 549, 550.
- Suffield Ecclesiastical Society v. Loomis** (42 Conn. 570), doubted ; **Union Institution for Savings v. City of Boston** (129 Mass. 82), 311.
- Sumner v. Jones** (24 Vt. 317), denied ; **Troewert v. Decker** (51 Wis. 46), 810, 811.
- Tucker v. Mowry** (12 Mich. 378), denied ; **Troewert v. Decker** (51 Wis. 46), 811.
- Van Keuren v. Corkins** (66 N. Y. 77, doubted ; **Burhans v. Hutcheson** (25 Kans. 625), 276.
- Ward v. Turner** (2 Ves. 431), denied ; **Pierce v. Boston Five Cents Savings Bank** (129 Mass. 425), 373.
- Williams v. Paul** (6 Bing. 653), denied ; **Troewert v. Decker** (51 Wis. 46), 810.
- Wilson v. Mayor, etc., of New York** (1 Den. 595), denied ; **Gillison v. City of Charleston** (16 W. Va. 282), 764.
- Winckworth v. Mills** (2 Esp. 484), denied ; **Anderson v. Spence** (72 Ind. 220), 164.
- Winslow v. Merchants' Ins. Co.** (4 Metc. 306), denied ; **Wright v. Bircher's Ex'r** (72 Mo. 179), 435.
- Young v. Thompson** (2 Kans. 83), denied ; **Union Institution for Savings v. City of Boston** (129 Mass. 82), 314.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

HERSHY V. CLARK.

(85 Ark. 17.)

Contract — between tenants in common as to survivorship — joint will.

An agreement in writing, between tenants in common, that the survivor shall take the other's estate, is invalid.

A joint will, conditioned to take effect on the death of both, is invalid.

BILL in equity. The opinion states the case. The bill was dismissed below.

Rose, for appellant.

EAKIN, J. Abram and Aaron Clark were two brothers, both unmarried, who, working together, had by their joint industry acquired a large personal and real estate, all of which they held as tenants in common, regardless of whether the legal title had been taken in the name of both, or either. They had a mother, Nancy Clark, and four sisters, to wit: Susan and Sarah Clark, both unmarried, Elizabeth Miller, a widow, who died leaving an only son,

Abram Miller, and the complainant, Ann Eliza Hershy, whose husband was, at the time of the transaction herein, and still is, alive.

On the 11th of May, 1850, both brothers, being then residents of Pope county, entered into a mutual obligation in writing under seal. After reciting that they had, mutually and by their joint labor and energy, acquired what property they, and each of them, then held and possessed, they thereby agreed between themselves, that the survivor of them should have, hold and possess, all the interest of both parties in the property, real and personal, which they then owned, to the exclusion of all other persons whatever. "Wherefore," the instrument proceeds to provide, "the said Abram Clark for the consideration hereinafter mentioned, hereby gives and grants unto the said Aaron Clark, at the death of the said Abram (should the said Abram die before the said Aaron), all his property, real and personal, which he may now have, or which he, the said Abram, may have at the time of his death, to have and to hold the same, to the said Aaron, and his heirs forever." Aaron, on his part, and in like language, conveyed all his interest in the property, present and prospective, to Abram, in case the latter should survive. The instrument was signed and sealed by the parties, and attested by two witnesses, but not in the form usually adopted in the attestation of wills.

Abram died about the 17th of May, 1851, at which time the brothers owned large amounts of personal property, consisting of slaves, cash, money at interest, goods and choses in action, more than enough, taking one-half, to have paid all of Abram's debts. There were also lands and town lots so held in common, in Fort Smith, Sebastian county, and in the counties of Pope and Yell and Johnson. Aaron had, shortly before, removed to Fort Smith, and resided there. On the death of his brother he took possession of all the joint property, claiming it as his own under the agreement. He became, and was recognized as the head of the family; and his mother depended upon him wholly for support. She was not very old, and the proof leaves the impression that she was competent to deal for herself with regard to business affairs. She renounced all claim to Abram's estate; and in order to carry out the agreement of the brothers, she, at Aaron's suggestion, and to avoid misunderstanding, conveyed to him, on the 8th of December, 1851, all her interest in Abram's estate, real or personal. She also

Hershy v. Clark.

took out letters of administration on Abram's estate, but seems never to have acted. The object seems to have been to prevent interference, by other parties, with the transmission of the whole estate to Aaron. In all the matters she acted intelligently, without undue influence, or actual fraud on the part of Aaron.

Aaron died on the 14th of November, 1855, leaving a will. By it he gave to his mother and his sister Sarah all his real estate in Sebastian and Pope counties, to hold as tenants in common; also his personal property of all kinds, subject to his debts. To his sister Elizabeth Miller he gave all his real estate in Perry and Johnson counties; and to complainant, Ann Eliza, all his real estate in Yell county, and other real estate not disposed of. This will was duly probated on the 17th of November, 1855; and Sol. F. Clark, named as executor therein, received letters testamentary. He seems to have taken no control of the real estate; and the personal property which came to his hands was by him, with some trivial exceptions, turned over to said Sarah.

On the 12th of June, 1860, Sarah and her mother Nancy executed a writing which they described, and intended, as their joint will, duly attested by witnesses. By it they gave to Elizabeth Miller, with some real estate, a negro boy, all their household and kitchen furniture, and a carriage and horses. To the complainant, Ann Eliza, they gave \$1,000, and also the remainder interest in all the property given to Mrs. Miller after the latter's death. The balance of their property they bequeathed to trustees for charitable purposes.

It was provided however that the "bequests and devises" should be postponed, as regarded use and enjoyment, until the death of both, with a reservation of right in the survivor to have the sole control, management and disposal of all the property during her life—the balance, undisposed of, at the death of the survivor, being all that was subject to the provisions of the will.

Susan had meanwhile died unmarried; and on the 27th of November, 1861, Nancy Clark died, leaving as her next of kin her three children—complainant, Elizabeth Miller and Sarah. No notice at the time was taken of the joint will, and in 1870 complainant's husband, Benjamin F. Hershy, was duly appointed administrator of her estate. On the 14th of September of that year, Sarah being still alive, the foregoing joint will was probated by the oath of one of the witnesses.

About that time complainant, Ann Eliza Hershy, filed this bill against Sol. F. Clark as administrator of the estate of Aaron Clark, her husband, Benjamin F. Hershy, as administrator of Nancy Clark, Sarah Clark and Abram Miller, claiming as one of the heirs of her brother Abram, and also as heir and distributee of her mother Nancy. She seeks an account of the personal effects turned over to Sarah by Sol. F. Clark, the executor of Aaron, and of the personal property of her mother, and of moneys received by Sarah for rents and profits, and for sales of lands; and that her distributive share of said estate be ascertained, and that she have partition, etc.

Sarah Clark answered the bill, insisting upon the good faith of the conveyance from her mother to Aaron of the property she derived from Abram's estate, and denying all fraud or imposition or undue influence. Her answer does not controvert the material facts above set forth, and upon them she bases her right to retain the property. She makes her answer a cross-bill to quiet her title. Abram Miller adopts her answer.

The statute of limitations was also relied on by defendants.

The cause was heard upon the pleadings, exhibits and depositions. The court upon hearing, came to the conclusion that the matters set forth in the bill did not entitle complainant either to an account or partition, and dismissed it with costs. She appealed.

The instrument executed between the brothers conveyed nothing *in presenti*. The intention of it is expressly declared to be that the survivor should have all the interest of both parties in the property. The use of the present tense in the words "gives" and "grants" is qualified by the words which follow, "at the death of said Abram," in one contingency, and "at the death of said Aaron" in the other. It is not the case of a vested right conveyed by the instrument, reserving a life estate in the grantor. It has been repeatedly held that such an instrument as that last mentioned will be sustained as a valid deed *inter vivos*. They were often used in dispositions of slave property, and sustained, so far as the cases have come within our notice, by the courts of all the southern States. But this instrument, now before us, is not of that character. It professes to convey nothing *in presenti*, and cannot stand as a conveyance; nor can it be upheld as a mutual covenant. It is unreasonable, and against public policy, that one should be allowed, by an irrevocable contract, not only to denude himself of all control of all his property, of every nature whatever, which he

Hershy v. Clark.

at the time possesses, but also of all he may afterward acquire. Such a contract would not be enforced either in law or equity. It is obvious, too, that the brothers did not intend their obligations to have that force during their lives.

There is no possible view of this contract which would give it any binding force during their joint lives. It was revocable at pleasure by either.

Whether, if properly proven, it might not have operated, on the contingency of the death of one of them, as his separate will, is a question which does not arise, and upon which we intimate no opinion. No effort was made to prove or sustain it as a will of Abram, with regard to his share of the joint property.

The effort of Nancy Clark and her daughter Sarah to execute a joint will was nugatory. There can be no such thing as a joint will, to take effect on the death of the survivor. A will must take effect at the death of the testator, and not at a time still in the future. This instrument, so far as regards Nancy Clark's property, could only have taken effect by its terms, by vesting in Sarah the complete disposition and control of all her mother's property, without imposing any obligation on Sarah to carry out the benevolent purposes had in view by both; for with regard to the latter, her part at least was and remains ambulatory, and she may defeat the common intention by changing her will. There is no mutuality with regard to the future charitable objects; and the mother cannot be supposed to have intended that the remnant of her property, not disposed of by Sarah, should go in any event to the charities in view, without the aid of Sarah's property also.

This effort illustrates the force of the principles stated by Mr. Jarman in his work on Wills, vol. 1, p. 27. He says: "A joint or mutual will is said to be unknown to the testamentary law of England. An objection to such an instrument as testamentary, is its irrevocability, for it is of the essence of a will that it is ambulatory, and may be revoked at any time prior to the death of the testator." And he refers to *Clayton v. Liverman*, 2 Dev. & Bat. 558, which is directly in point.

The joint instrument between Abram and Aaron Clark, and the joint will of Nancy and Sarah Clark, should both have been disregarded.

The complainant was, at the death of Abram, and has since continued, a *feme covert*. She is not barred by the statute of limitations.

She is entitled, under our statutes of descents and distributions, to a share of the real estate of which her brother Abram died possessed; also to her proper share of the real and personal property of her sister Susan and her mother. She is entitled to an account, to be taken under the direction of the court, to ascertain these interests.

She must elect however, as her bill virtually does, to disclaim all rights to the property in question acquired, directly to herself, through the will of her brother Aaron. That will disposes of interests which she claims adversely, and the case for election arises. She must rest on her rights to any of the property in question derived through the statutes of descents and distributions from Abram or her mother or her sister Susan. The property has never been divided, and it must all be done in one suit. The usual remedial proceedings in equity are sufficient.

The court erred in dismissing the bill for want of equity. Reverse and remand for further proceedings consistent with law and this opinion.

Reversed and remanded.

BOYD V. BRYANT.

(35 Ark. 69.)

Constitutional law — local option liquor laws.

A police law, to take effect upon local adoption, is not unconstitutional.*

THE opinion states the case.

Rousseau, for appellant.

M. L. Jones, contra.

ENGLISH, C. J. This case involves the constitutionality of the following act:

*To same effect, *State v. Cooke* (24 Minn. 247), 31 Am. Rep. 344.

Boyd v. Bryant.

“ An act to prevent the sale or giving away of vinous, spirituous or intoxicating liquors, within three (3) miles of any academy, college or university in this State.

“ Be it enacted by the General Assembly of the State of Arkansas :

“ Sec. 1. That it shall be unlawful for any person to sell or give away any vinous, spirituous or intoxicating liquors, within three (3) miles of any academy, college, or university in this State while pupils are being taught or instructed in the same.

“ Sec. 2. The provisions of this act shall not apply to druggists who sell said liquors for medical purposes only; provided, that said druggists shall in every case procure the written certificate of a regular practicing physician, that the liquor so sold or given away is for use in a case of actual sickness, and as a remedy therefor ; provided, further: that the provisions of this act shall not apply to cities of the first and second classes, in which a regular police force is maintained.

“ Sec. 3. That the provisions of this act shall apply to those preparations known as ‘ bitters,’ the body or portion of which consists of alcohol or other intoxicating liquors.

“ Sec. 4. That whenever the adult residents of any township of any county desire to avail themselves of the provisions of this act, a majority of them shall petition the County Court of their county, setting forth the fact that an academy, institute of learning, or university, in which pupils are taught, is located in their township or district, and praying that the sale or giving away of spirituous liquors be prohibited within three (3) miles of the same ; whereupon should said County Court be satisfied that a majority of said residents so petition, shall make an order in accordance with said prayer, and from thenceforth it shall not be lawful to vend or give away any spirituous liquors within the limits aforesaid.

“ Sec. 5. This act shall not be construed to affect or repeal any law in force in regard to selling liquors within certain prescribed limits of any institution of learning, passed at this session of the general assembly.

“ Sec. 6. That any person violating the provisions of this act shall be deemed guilty of a misdemeanor, and for each offense shall be fined in any sum not less than twenty-five (25), nor more than one hundred (100) dollars ; and this act shall take effect and be in force ninety (90) days after its passage.” Approved March 2, 1875.

On the first of October, 1877, William Bryant, and about 224 other persons, filled a petition in the County Court of Dorsey county, representing that they were a majority of the adult residents of Red Land township in said county, and that there was an academy at New Edinburgh in said township, in which pupils were taught, and that spirituous liquors were sold in New Edinburgh, to the detriment of the school kept in said academy, and praying an order of the court, under the above act, to prevent the sale or giving away of spirituous liquors, etc., within three miles of said academy, etc.

W. M. Boyd, a licensed liquor dealer of New Edinburgh, on behalf of himself, and others, not named, demurred to the petition, on the grounds that the court had no jurisdiction of the subject-matter of the petition, and that the granting of its prayer would conflict with his vested rights under the Constitution and laws of the state. The court overruled the demurrer, and, on ascertaining that the facts stated in the petition were true, made the order prayed for, with an exception in favor of any duly licensed dealer until the expiration of his license.

Boyd appealed to the Circuit Court.

In the Circuit Court the demurrer to the petition was argued and submitted on the grounds that the above act was unconstitutional and void.

The court held the act valid, overruled the demurrer, heard the case *de novo*, and finding the facts stated in the petition to be true, made an order similar to that made by the County Court, and Boyd appealed to this court.

[Omitting a minor consideration.]

It is furthermore submitted that the act is unconstitutional because it is left to take effect or operate in the school districts at the option of a majority of the adult residents thereof, etc.; in other words, that it is a local option law.

If the act is unconstitutional for that reason, it would follow that all of our statutes making the granting or withholding of licenses to sell liquors, etc., to depend upon the suffrages of the electors of townships and wards, would be for a like reason invalid, and the State and her courts have done great injustice to vendors of ardent spirits by enforcing such acts, for they are and have been classed as local option laws.

In some of the States such laws have been held unconstitutional,

Overton v. Matthews.

but the clear weight of authority is now in support of the validity of such acts. See Cooley on Const. Lim. (4th ed.), pp. 151-2, and cases cited in note 2, p. 152.

In the cases cited the question is fully discussed, and we deem it of no importance to repeat the argument. See *State v. Court Com. P.*, 36 N. J. 72; s. c., 13 Am. Rep. 422; *Locke's Appeal*, 72 Penn. St. 491; s. c., 13 Am. Rep. 716; *State v. Wilcox*, 42 Conn. 364; s. c., 19 Am. Rep. 536. "The legislature cannot delegate the power to make laws, but it can make a law to delegate the power to determine some fact or state of things upon which the law makes or intends to make its own action depend." *Locke's Appeal*, 72 Penn. St. 491; s. c., 13 Am. Rep. 716; *Slinger v. Henneman*, 38 Wis. 504; *Erlinger v. Boneau*, 51 Ill. 94.

Under the act in question, upon the petition of a majority of the adult residents of a township in which there is an academy, etc., the County Court makes an order preventing the sale, etc., of liquors, etc., within three miles of such academy, etc., under the penalty prescribed by the act.

Under the license act, the licenses are granted or withheld on the vote of the electors of a township or ward.

Under either act, the operation of the law in a particular township, ward or district, is made to depend upon the option of the electors, or adults, and the order of the County Court. On principle there is no difference between the acts. All such acts are passed, and their mode of operation regulated, under the police power of the State over the subject of vending ardent spirits.

Judgment affirmed.

OVERTON V. MATTHEWS.

(35 Ark. 146.)

Negotiable instrument — delivered blank as to date — fraudulent filling of blank.

The maker of a note delivered it to the payee, blank as to date, with authority to fill in the date when the goods for which it was executed should be delivered. Without delivering the goods, the payee filled in the date, and transferred the note to a purchaser in good faith. *Held*, that the latter could maintain an action thereon.

ACTION on a promissory note. The facts were as stated in substance in the head note. The defendant had judgment below.

Wells and McCain, for appellant.

ENGLISH, C. J. [After stating facts and testimony.] A material alteration of a note in its date or other parts, by the payee or holder, without the consent of the makers, avoids it as against the makers, even in the hands of a *bona fide* holder without notice of such alteration. 2 Dan. on Neg. Inst., §§ 1373, 1376; *Lemay v. Williams*, 32 Ark. 166; *Inglish v. Breneman*, 5 id. 377.

If the date be left in blank, any holder has the right to insert the true date (*Inglish v. Breneman, sup.*), and should he insert an improper date, though it will avoid the note as between him and the makers, yet by the law merchant, one who takes the note for value before maturity, without notice of such improper filling of the blank date, may recover upon it against the maker. 1 Dan. on Neg. Inst., §§ 142–143, 843.

It seems from the evidence in this case that the makers of the note intrusted it to the payees (the Well Auger Company), with authority to fill the blank date on delivery of the auger for which it was given, and that they in bad faith filled in the date and transferred the note without delivering the auger, but that appellant purchased the note for value, before its maturity, it being fair on its face, without any notice of such wrongful filling of the blank date. Appellees, by confiding in the auger company, put it in their power to fill the blank date wrongfully, and impose the note on strangers, and they must suffer for the wrongful act of the company, in whom they reposed confidence and whom they intrusted with such authority, rather than appellant, who was a stranger to the transaction and a *bona fide* assignee of the note.

If the Well Auger Company had sued on the note, the plea of the appellees would have been good, but it was bad as to appellant, for want of averment of notice, etc.

[Omitting minor matters.]

Reversed and remanded for further proceedings.

King v. Jarman.

KING V. JARMAN.

(35 Ark. 190.)

Statute of frauds — symbolical delivery — when valid.

Parties orally agreed for the purchase and sale of a lot of cotton, consisting of six bales, weighed and stored in a warehouse, and the seller gave the purchaser an order on the warehouseman for it. The seller notified the warehouseman of the sale, and the purchaser applied to him for the cotton, but delivery was postponed by agreement of the warehouseman and the purchaser until the next morning. No money passed, and no other writing was executed. *Held*, a valid delivery and acceptance. (*See note, p. 16.*)

ACTION for price of goods. The opinion states the case. The plaintiff had judgment below.

Tappan & Hornor, for appellant.

Rose, contra.

EAKIN, J. Jarman sued King and Clopton in an action at law for the price of six bales of cotton, which he alleges he sold to them. They denied the sale, and that was the sole issue. It was tried by a jury, which found for the plaintiff, and the court rendered judgment accordingly. A motion for a new trial was overruled, and defendants appealed.

There is little or no conflict in the evidence, which reveals the following facts: Jarman, who was a customer of King & Clopton, merchants and cotton buyers at Helena, and kept an account with them, had six bales of cotton in a warehouse there for sale, which had been weighed and marked for identification. He came to town on the 15th of February, 1877, made some purchases, and was desirous of returning on the train which left about three o'clock in the afternoon. He produced his samples taken that day to Clopton, one of the firm, who made him an offer to purchase the cotton at a fixed price per pound, which was accepted, being ten and a half cents for three bales, and eleven and three-fourths for the three others, whereupon he gave the following order upon the warehouse:

“HELENA, ARK., *February* 15, 1877.

“Messrs. Paul F. Anderson & Co. will deliver my six bales of cotton to Messrs. King & Clopton, three bales marked ‘A. G. J. (S.),’ and three bales ‘S. M. R.’

“A. G. JARMAN.”

He testifies that upon giving the order he told Clopton that the bales had been weighed; that he could take the weight off from the bales, place the amount to plaintiff’s credit and send him a statement, to which Clopton, handing him back the samples, replied: “Very well. All right. I will send Dick Cook down to attend to it.” He says further that he does not know of any uniform custom in Helena as to selling cotton. After this the plaintiff took the train and left town.

Dr. W. H. Jarman, who accompanied plaintiff to King & Clopton’s store, and was present at the negotiation, says that plaintiff was in a hurry to leave on the train. “Col. Jarman was standing up, facing Mr. Clopton, and said that the cotton had been weighed since it was put in the warehouse; ‘all that you have to do is to get off the weights and place the amount of the value of the cotton to my credit.’ Clopton said, ‘Very well, Col. Jarman. I will send Cook down right away.’ We then left the office, all parties being pleased.”

James W. Clopton’s account of the transaction is: “After a little conversation between us, we agreed upon the price. Col. Jarman asked me to go with him immediately and receive the cotton. He said he wanted to go on the train, and did not have much time to spare. I told him I could not possibly leave the office, but that Mr. Cook, our cotton man, was absent, and as soon as he came back I would get him to go and attend to it. He then wrote an order.
* * * Col. Jarman left immediately, as he seemed to be in a great hurry, etc. In an hour, or half hour, he saw Cook, and gave him the order to attend to. He saw nothing more of Cook until next morning, when he still had the order.

“Meanwhile the warehouse had been destroyed by fire during the night. Only one of Jarman’s bales had been saved, which, by inadvertence, was afterward shipped off with other cotton of King & Clopton’s, and for which they offered, and are still willing, to account with plaintiff.”

Charles Rostrop, an employee of the warehouseman says that on

King v. Jarman.

the evening before the fire, Mr. Cook met him at Burnell & Turner's shed, and said he wanted to get Col. Jarman's cotton, and have ticket changed. Witness was busy, and could not go at once. Cook waited until it became too dark to go into the warehouse without a light, which the warehouseman would not permit. Witness then told Cook to wait till morning. Cook did not show any order. Witness always required the order before tickets were changed.

Anderson, the warehouseman, says that he met Jarman on the street about three o'clock, on the 15th of February, 1877, who told him that he had given an order on him, to King & Clopton, for the six bales of cotton, and asked witness to take off the weights and marks and send them to him by mail. He told witness that he had sold the cotton to King & Clopton, and that Cook would come down to receive it; that he did not himself have time to attend to it. He directed witness to turn it over to King & Clopton. When Cook came it was too dark to go into the warehouse without a lamp.

The witness was asked on the trial, by plaintiff: "For whom were you holding that cotton, after you had a conversation with Jarman and Dick Cook, clerk of King & Clopton?" To which he answered: "I would have given the cotton to King & Clopton, relying upon the integrity of the parties. I considered it theirs; and if I hadn't, I would not have shipped it for them. I thought it was transferred to King & Clopton. I saw no order, nor was any delivered to me." The single bale saved, the witness had shipped for King & Clopton without any special order, and it seems contrary to their intention.

Cook testifies that he had to wait upon the warehouse clerk upon the evening in question, until it was too dark to go into the warehouse and attend to the business. He explained to the clerk that he wanted to see the cotton, re-sample and re-weigh it, and get the marks on it. The clerk promised to roll it out and deliver it next morning. About that time Anderson, the warehouseman, rode up, and promised to deliver the cotton next morning and give a receipt for it. The order was never presented.

Some witnesses deny that Jarman asked Clopton to go with him and receive the bales.

There was evidence of a general custom in Helena with regard to cotton buying; that when sales were made by sample, it was

usual for the purchaser to proceed, with all convenient dispatch, to re-sample, and that he had the option to reject the cotton if the bulk should not correspond with the sample shown. After re-sampling, it was usual to pay the money or merchandise; and the purchaser, if it had been weighed, had the option to take it at the weights already fixed, or to have it re-weighed, and take a ticket. Some witnesses say however that there was no unvarying custom, but that these matters are subject to special agreement or understanding.

Very full instructions on both sides, and of the court's own motion were given. Taken altogether, they substantially present the law, and no complaint is made in the motion for a new trial, with regard to them. It is simply based upon the grounds that the verdict was contrary to the law and the evidence.

The first question which arises is under the Statute of Frauds, which provides that no sale of property over the value of thirty dollars shall be binding unless there be: First, some note or memorandum of the contract for sale, signed by the party to be charged; or second, unless the purchaser shall accept a part of the goods so sold, and actually receive the same; or third, shall give something in earnest to bind the bargain, or in part payment thereof.

A simple order to deliver property to another does not necessarily imply any contract for sale. It is compatible with many other intentions than a transfer of title. It may be for change of custody, or to be held as a pledge, or in some other way, as bailee. It is not a note or memorandum of a sale. Nothing in this case was given as earnest. The credit to be entered was *in futuro*, when the amount should be calculated from the weights, either as shown by the bale marks, or if the purchaser should choose, by actually weighing. Did the purchaser, then, accept and actually receive the cotton? That he accepted, and that unconditionally, is shown by the evidence. Whatever may have been the general custom as to reserving the privilege of sampling; and whatever the law may presume in case of such purchases by samples, as to the reserved right of testing the bulk, it is nevertheless very clear that parties may agree to an immediate transfer of property with or without samples. They may be used only to influence the judgment of the purchaser, who may act upon his confidence in the seller, and make a positive purchase on the spot. Of course, he might rescind the contract in case of fraud, or recoup for difference of value, in case the bulk

King v. Jarman.

should fail materially to answer samples, but there is no charge in this case of either. The jury had before them the facts — that the buyer and seller stood in the relation to each other of merchant and customer, reposing mutual confidence; that the vendor was pressed for time, and unable to attend to the usual course of sale; that he left without any other request than to be advised of the amount of the credit he would receive, or what was the same, of the weight of the cotton, of which he did not have with him the memorandum. This, a prudent man, careful of his affairs, would have naturally desired, if the contract had been expressly, and in the most indubitable terms, a present sale and transfer of property. The jury could not have well found room to doubt, upon the whole case, that the cotton was accepted, so far as the mind and intention of Clopton could constitute an acceptance, and that such acceptance, so far as the ownership was concerned, was unconditional.

Having the intention to accept, did he actually receive? The statute has never been, in this State, nor in England, whence we derived it, construed to abolish the doctrine of symbolical delivery. Whoever receives in such mode as the nature of the property or its situation makes necessary, receives as actually as by manual caption or asportation, or some direct interference with the *corpus* of the property. With regard to bulky articles, or those not immediately accessible, symbolical delivery, by something which may be proved *in pais*, of a satisfactory nature, satisfies the reason and policy of the statute. This court has expressly so held in similar cases. See case of *Puckett v. Read*, 31 Ark. 131. The order for delivery, although not evidence of a contract, nor even a memorandum of one, was nevertheless a thing absolutely potent to confer the right of immediate possession, except as against warehouse liens (of which none are shown), and even stronger evidence of that right than would have been a gin receipt. The jury, under the evidence and law of the case, as presented by the court, did not err in finding that the defendants received the cotton. This satisfies the statute.

It remains to inquire if any thing more was necessary to pass the property. The common-law principle applicable to this case has long been settled, clearly formulated and reiterated in numberless opinions and text-books. It is ever arising again, not from any doubt as to its terms, but from the difficulty of its application

amidst the infinite shades of difference in the circumstances of different cases. It may be stated thus:

Where the minds of the parties have assented to the present purchase and sale of a specific chattel, which may be clearly identified and separated from other property, and the sale be dependent on no conditions nor contingencies, and such possession be given as the nature of the subject and the situation of the parties with regard thereto will permit of, and the vendor has done all that is required of him with respect to the property, the title will pass. And this will be so, notwithstanding something may be still necessary on the part of the vendee, to ascertain the exact price. That when intrusted to the vendee, is a matter of confidence not affecting the sale. One may sell and transfer to another a specific lot of neat cattle, for instance, to be paid for at so much per pound when butchered and sold; or a hogshead of meat, to be weighed by the vendee on taking it to his house, and paid for by the pound at a fixed rate. These things enter into the daily course of traffic, and it would be highly embarrassing to hold that in such cases title did not pass to the vendee until all should be done by both parties to fix quantity, quality, or price. The jury were in this case warranted in finding that the sale had been made.

In this case the plaintiff had not only done every thing required and expected of him, but more. He had seen the warehouseman, advised him of the sale and order, and directed him to act upon it; and had gone home without any thought of seeing or claiming the cotton again. He trusted defendants to make proper credits, and advise him of the weights. Evidently the defendants did not wish nor expect him to do any thing more. They should bear the loss.

Judgment affirmed.

NOTE BY THE REPORTER.—Browne says (Stat. Frauds, § 318): "The actual receipt of the goods does not necessarily involve manual taking possession of them by the buyer. In many cases this would be impracticable, and no other receipt is required than such as is consistent with the nature, locality and condition of the goods. Though this be merely symbolical, the statute will be satisfied when the case admits of none other. It is therefore a general rule in regard to the actual receipt of inaccessible, or ponderous, or bulky articles, that it may be accomplished by the performance of any act which shows that the seller has parted with the right to control the property, and that the purchaser has acquired that right. These goods lodged in a warehouse may be transferred symbolically by the delivery of the key." *Wilkes v. Ferris*, 5 Johns. 385; *Chappel v. Marvin*, 2 Alk. 79.

The goods may even remain in the seller's hands, without even a symbolical transfer, and the change in the nature of the holding may be inferred from his subsequent conduct toward them, where it is evident that he holds as bailee of the buyer and subject to his order, and the buyer exercises acts of ownership over them. Browne Stat. Frauds, §§ 318 a, 318 b.

King v. Jarman.

In *Chaplin v. Rogers*, 1 East, 122, parties bargained for the sale of a stack of hay, standing in their presence. Afterward the defendant agreed to sell part of it to a third person, by whom it was carried away, without the knowledge and against the direction of the defendant. This was held a valid delivery and acceptance. Lord Kenyon said: "Where goods are ponderous, and incapable, as here, of being handed over from one to another, there need not be an actual delivery; but it may be done by that which is tantamount, such as a delivery of the key of a warehouse in which the goods are lodged, or by the delivery of other indicia of property. Now here the defendant dealt with this commodity afterward as if it were in his possession; for he sold part of it to another person."

In *Elmore v. Stone*, 1 Taunt. 457, the plaintiff kept a livery stable and dealt in horses. He and the defendant negotiated for the sale of a span of horses, and defendant sent him word that the horses were his, but that as he had neither servant nor stable, the plaintiff must keep them at livery for him." The plaintiff then removed them from his sale stable into another. *Held*, a valid delivery and acceptance. Lord Mansfield treated the removal from one stable to another as immaterial, holding that the direction that the horses should stand at livery was sufficient. "The plaintiff possessed them from that time, not as the owner of the horses, but as any other livery stable keeper might have them to keep." (This circumstance was however regarded as important by Bayley, J., in his remarks on this case, in *Carter v. Touseint*, 5 B. & Ald. 855.)

He also instances a note given, addressed to a wharfinger, as a constructive delivery.

In *Searle v. Keeves*, 2 Esp. 596, it was held that a written order given by the seller of 20 barrels of rice, to the buyer, directing the person in whose care the goods were to deliver them, followed by delivering of the order to the warehouseman, is a sufficient delivery and acceptance within the statute of frauds.

In *Hodgson v. LeBret*, 1 Campb. 233, the purchaser wrote his name on a piece of linen. This was held sufficient to take the sale out of the statute as to that piece, the terms having been agreed on, but not as to other pieces not marked or produced. Lord Ellenborough put this on the ground that the defendant's purpose in writing her name upon it was to denote that she had purchased it, and to appropriate it to her own use.

In *Anderann v. Scott*, *id.*, note 225, the same was held of a sale of several pipes of wine, the tasting pegs or *spills* of the cask being cut off, and the plaintiff's initials being marked on the casks by the seller's clerk in presence of the buyer. The contrary was held in *Proctor v. Jones*, 2 C. & P. 532, the terms of payment not having been settled at the time.

In *Castle v. Swoorder*, 6 H. & N. 828, the plaintiff kept a bonded warehouse, of which he had one key and the custom house officials another. The defendant agreed to buy of him two puncheons of rum, to remain in bond till wanted. The plaintiff sent him an invoice describing the puncheons by marks and numbers, and as "free six months", *i. e.* free of rent for six months. He entered in the warehouse book the sale of the rum to defendant and proved that after this he had no power to get the goods out. The goods remained there two years and the defendant tried to persuade the plaintiff to buy them back. *Held* sufficient to warrant a finding that the character of the holding was changed and that there was a valid delivery and acceptance.

In *Martin v. Wallis*, 6 Ell. & B. 726, plaintiff sold a horse to defendant, and requested defendant to lend it to him, and kept it by defendant's consent. *Held*, a valid delivery and acceptance. Erle, J. said the question was "whether there is an actual sale, and an act which is inconsistent with any-thing but ownership". Crompton, J., said: "The case is analogous to that of goods warehoused. I go to the warehouseman with the seller, and say to him, 'you now hold these goods for me': the warehouseman then becomes the bailee of the purchaser, and the possession of the warehouseman becomes that of the purchaser."

In *Beaumont v. Brengert*, 5 C. B. 301, A. agreed to buy of B. a carriage then in B.'s shop, at the same time desiring certain alterations, which were made, and the carriage was then at A.'s request put back in the shop. A. afterward called at the shop, and requested B. to hire a horse and man for him, and send the carriage to his house the next day, that he might drive. *Held*, a sufficient delivery and acceptance.

In *Holmes v. Hoskins*, 9 Ex. 753, there was a sale of cattle in a field. It was agreed that the cattle should remain there a few days, and that the purchaser's servants should feed them with the plaintiff's hay. *Held*, no evidence of acceptance. This was put on the

King v. Jarman.

ground that the seller did not intend to part with possession until payment. The same was held in *Tempest v. Fitzgerald*, 3 B. & Ald. 680, where A. agreed to buy a horse for ready money, rode it, and gave directions for its treatment, but requested the seller to retain it for a certain time, when he agreed to take and pay for it. *Held*, no delivery. This was put on the ground that the sale was for ready money. The court distinguished *Blenkinsop v. Clayton*, 7 Taunt. 597, where the sale was not for ready money, and the horse was to be delivered within an hour, and the purchaser treated it as his own by offering it for sale. The same was held in *Carter v. Thussant*, 5 B. & Ald. 855, where the horse was to remain with the vendor for twenty days, and then was sent to grass by direction of the vendee, but at his desire was entered as the horse of the vendor. It was conceded that it would have been otherwise if the vendee had directed the entry to be made in his own name.

In *Howe v. Palmer*, 8 B. & Ald. 821, there was a sale of twelve bushels of tares, in the vendor's possession, part of a larger bulk, to remain in the vendor's possession until called for. Subsequently they were measured and set apart for the vendee. *Held*, no acceptance. *Elmore v. Stone* was distinguished on the grounds of the transfer of the horse and the incurring of expense by the purchaser for the keep. *Best, J.*, said: "The spirit I take to be this, that a contract shall not be binding, unless there be some act done which directly shows an acceptance on his part."

In *Baldy v. Parker*, 2 B. & C. 37, articles were selected; the pieces agreed on; the purchaser marked some of them with a pencil, saw others marked, and helped to cut off others; the bill and goods were sent to him but he refused to accept. *Held*, that he was not bound. It did not appear that the goods were cumbrous. The case differs from *Hodgson v. LeBret*, for there the purchaser marked a piece of linen with his name.

In *Green v. Merriam*, 28 Vt. 801, there was a sale of sixteen sheep in the plaintiff's yard, which the parties then drove into another yard of the plaintiff, and defendant agreed that if the plaintiff would keep them till a certain day, he would then get them and pay for the sheep and keeping. *Held*, a valid delivery and acceptance.

The same was held in *Janvrin v. Maxwell*, 23 Wis. 51, where there was a sale of six barrels of beef, the purchaser requesting the seller to roll it into the back yard of the shop and store it for him, and sell it for him if he had an opportunity, and subsequently promising to take it away. "The purchaser therefore gave directions for a specific disposal of the property, thus assuming its control, and their directions were followed by the plaintiffs." *Held*, a valid acceptance.

In *Phillips v. Humwell*, 4 Greenl. 376, a sale of a yoke of oxen was agreed on, but the seller borrowed them to haul a load of lumber to his home, ten miles distant, before any actual delivery was made. *Held*, no delivery. The court said: "There is nothing thus far from which any inference is to be drawn that payment is not to preclude a delivery. What followed was only an intimation on the part of the owner that he was not then ready to part with his oxen, but wished to borrow them to convey home certain timber. To this the plaintiff acceded if he would not use them for any other purpose. A request of a favor of this kind in strictness admits that the property does not belong to the party seeking it, but to him of whom the favor is sought. But language is qualified by the manner and connection in which it is used. We are to gather the intention of the parties from their acts and declarations, taken together, and not from the strict and accurate meaning of a single term. Walker, the former owner, was aware that the price being settled, the plaintiff upon payment would be entitled to immediate possession. This being inconvenient to him, he desired that it might be postponed, until he had used them for the purpose intimated. He knew that the plaintiff's offer did not imply an engagement to take them at a future day; and the request made by him can fairly, under the circumstances, be understood as expressing nothing more than a desire on his part that the bargain might not be defeated by the use he proposed to make of the oxen, and that the plaintiff would hold himself ready to take them when that purpose had been answered." This is hostile to *Marvin v. Wallis*, *supra*, and we believe the latter to be right. In the Maine case the court said, "The statute of frauds is a very beneficial one." while in the English case Lord CAMPBELL said, "It does more harm than good. It promotes fraud rather than prevents it."

In *Jewett v. Warren*, 12 Mass. 300, there was a sale of logs in a boom, and the seller

King v. Jarman.

showed them to the purchaser's agent, and executed a bill of parcels. This was held effectual. But this was not a case upon the Statute of Frauds. The same is true of *Leonard v. Davis*, 1 Black. 476.

In *Calkins v. Lockwood*, 17 Conn. 154, there was a sale of ninety-three tons of iron lying by itself: the vendor said to the vendee, stepping up to the iron, "I deliver you this iron, at that price." The court said: "The ponderous nature of the commodity rendered the removal of it, at that time, impossible. And why should it have been moved? The vendees were there upon the ground, and went up to receive the iron when it was delivered by the vendor. The delivery was not symbolical but actual; and it was received by the vendees at the hands of the vendor, with the intent to take and hold the possession of it." But where is the evidence that it was received and accepted? It is difficult to reconcile this with *Shindler v. Houston*, *infra*.

In *Ex parte Safford*, 2 Lowell, 563, hides were sold, weighed, placed by themselves in the vendor's warehouse and marked with the vendee's name, and he was to send for them when he pleased, and it was agreed that they were to be considered insured for his benefit by the vendor's general insurance. *Held*, a sufficient delivery and acceptance. LOWELL, J. said: "There is no doubt that the vendor may himself be the warehouseman or bailee. This was decided in the leading case of *Elmore v. Stone*, 1 Taunt. 458. I have seen it stated that this case has been overruled, but that is a mistake. It was fully approved by SHAW, C. J., who states the exact case, though he does not cite it by name, in *Arnold v. Delano*, 4 Cush. 40. It was cited and followed in *Beaumont v. Brayeri*, 5 C. B. 801, and *Marvin v. Wallis*, 6 Ell. & B. 726, and its doctrine reaffirmed in *Cusack v. Robinson*, 1 B. & S. 299."

In *Bass v. Walsh*, 39 Mo. 192, there was a sale of 228 bales of hay, lying by themselves on the levee, the seller giving the purchaser a descriptive ticket authorizing him to take the hay as soon as weighed. The purchaser requested that the hay should not be weighed on that day, to which the seller assented on condition that it should be at the purchaser's risk and expense. *Held*, to warrant a finding of delivery and acceptance.

In *Bailey v. Oyden*, 3 Johns. 399; 3 Am. Dec. 509, the goods, sugars, were in the possession of the vendor; an agreement was made on terms of sale; a minute of the import entry was delivered; indorsed notes were to be given for the purchase-price, and the goods were to be stored by the vendor at the purchaser's expense. *Held* (KENT, C. J.), not to amount to an actual delivery. He said: "The circumstances which are to be tantamount to an actual delivery should be very strong and unequivocal, so as to take away all doubt as to the intent and understanding of the parties. The agreement about storage might have been conditional and depending upon the final completion of the contract, as to the giving of the notes with a competent indorser, and the taking of the minute of the import entry was at least but an equivocal act. It was not an *indictum* of ownership."

In *Vincent v. Germond*, 11 Johns. 282, cattle were sold to remain in possession of the vendor, at the vendee's risk, until he called for them, and he afterward took them without saying any thing to the vendor. *Held*, a sufficient delivery. "It may be questioned," said the court, "whether what took place between B. Germond and the plaintiff, if standing alone, would amount to a delivery; but the subsequent conduct of the other defendant in taking away the three oxen, without any new contract, affords sufficient ground to infer a delivery. The defendants dealt with the oxen as their own, and as if in their actual possession."

In *Shindler v. Houston*, 1 Den. 52, the plaintiff and the defendant bargained respecting the sale, by the former to the latter, of a quantity of lumber piled apart from other lumber on a dock, and in view of the parties at the time of the bargain, and which had been measured and inspected. The parties having agreed as to the price, the plaintiff said to the defendant, "the lumber is yours." The defendant then told the plaintiff to get the inspector's bill, and take it to H., who would pay the amount. This was done next day, but payment was refused. The price was above \$50. This was held, by the Supreme Court, a valid delivery and acceptance. The court said: "Delivery in a sale may be either real, by putting the thing sold into the possession or under the power of the purchaser, or it may be symbolical, where the thing does not admit of actual delivery; and such delivery is sufficient and equivalent in its legal effects to actual delivery. It must be such as the nature of the case admits." This however was reversed by the Court of

Appeals, in 1 Comst. 261, the court holding that something more than mere words is necessary; that superadded to the language of the contract there must be some act of the parties, amounting to a transfer of possession, and an acceptance thereof by the buyer; and that the case of cumbrous articles is not an exception. GARDINER, J., said: "I am aware that there are cases in which it has been adjudged that where articles sold are ponderous, a symbolical or constructive delivery will be equivalent in legal effect to an actual delivery. The delivering of the key of a warehouse in which goods sold are deposited, furnishes an example of this kind. But to aid the plaintiff, an authority must be shown that a stipulation in the contract of the sale, for the delivery of the key or other indicia of possession, will constitute a delivery and acceptance within the statute. No such case can be found." BRONSON, J., who was one of the court below, delivered an opinion renouncing his former judgment. He said: "There may be a delivery without handling the property or changing its position. But that is only where the seller does an act by which he relinquishes his dominion over the property and puts it in the power of the buyer; as by delivering the key of the warehouse in which the goods are deposited, or by directing the bailee of the goods to deliver them to the buyer, with the assent of the bailee to hold the property for the new owner." "Here there was no delivery, either actual or symbolical." WRIGHT, J., also pronounced an opinion the same way. He said of *Elmore v. Stone*, supra, that it "was doubted in *Howe v. Palmer*, 8 B. & Ald. 824, and *Proctor v. Jones*, 3 C. & P. 534, and virtually overruled by subsequent decisions." He distinguishes it however by removal of the horses from the sale stable to the livery stable, and *Chaplin v. Rogers* by the buyer's sale of part of the hay which the purchaser took away. So that in both these cases there were acts in addition to mere words. As to the doubts about *Elmore v. Stone*, of which WRIGHT, J., speaks, BAYLEY, J., in *Howe v. Palmer*, said: "That case goes as far as any case ought to go, and I think we ought not to go one step beyond it. * * * I must say however that I doubt the authority of that decision." This is purely obiter, for he had clearly distinguished the case as above. In *Proctor v. Jones*, the case of *Elmore v. Stone* was not mentioned. BEST, J., did there doubt *Scott v. Anderam*, supra, but without any reason, for there the terms of the contract had been agreed on. The decision in both cases was clearly right, and there are no signs of any overruling of it. Mr. Browne says (Stat. Frauds, § 818, b), it "has been abundantly affirmed by subsequent decisions as recognizing the true rule." Three others concurred with these judges, JEWETT, C. J., and GRAY, J., dissented, JEWETT being the judge who gave the opinion below. Of this decision Browne says (Stat. Frauds, § 319, note), that it is "neither in accordance with authority, nor, it seems, with a sound view of the object and nature of the statutory provision." *Shindler v. Houston* is followed by the Commission of Appeals, in *Cooke v. Millard*, 65 N. Y. 352; s. c., 22 Am. Rep. 619; *Hallenbeck v. Cochran*, 20 Hun, 416. The latter was a sale of a stack of hay in sight; the seller said, "the hay is yours," and the purchaser said, "yes."

Hankins v. Baker, 46 N. Y. 666, is very much in point. R., a broker, offered to defendants ten casks of prunes, which they agreed, orally, to take. R. executed and delivered to plaintiffs a bought note in defendants' name for the prunes, and received from plaintiffs a warehouse delivery order therefor, which order he delivered to defendants, who received and retained it and requested R. to sell the goods for them. The ten casks had been separated and weighed to plaintiffs and were all they owned at the warehouse, on which the delivery order was given. Held, that the action of defendants was an adoption and ratification of the acts of R.; and the signature and delivery by him of the bought note made a valid contract for the sale of the goods within the statute of frauds. Also, that there was a sufficient delivery to charge defendants and maintain an action for goods sold and delivered.

The court said: "As Rich, when he signed and delivered to the plaintiffs the bought note, did make a note or memorandum of the contract in writing subscribed by the party to be charged thereby, there was a valid contract for the sale of the goods. Holding that there was a valid contract of sale, we need treat the question of a delivery only as it was necessary to charge the vendees on that contract, and to put the goods at their risk and maintain an action for goods sold and delivered. There was no manual delivery. But an actual delivery is not required. A symbolical delivery suffices. A delivery of an order on a warehouseman may be enough. *Hollingsworth v. Napier*, 3 Cal. 182, and note a; and

King v. Jarman.

see *Dunham v. Pettie*, 4 Seld. 508. Nor did any thing remain to be done to the goods by the plaintiffs. They had been weighed to the plaintiffs, and reweighed for the defendants. They had been separated to the plaintiffs from the larger quantity owned by their vendors. These ten casks were all that the plaintiffs owned at the warehouse on which the delivery order was given. So that it was these specific ten casks which the plaintiffs sold and delivered to the defendants."

Browne also says (Stat. Frauds, § 319 a): "When the goods at the time of the sale are in the hands of a bailee who holds them for the seller, it has generally been held essential to the proof of a constructive delivery to and receipt by the buyer to show not only a giving up of his control by the seller, but a communication of this to the bailee, and his assent to it and atonement to the buyer."

See *Webster v. Anderson*, 42 Mich. 554; a. c., 35 Am. Rep. 000.

In *Bentall v. Burn*, 3 B. & C. 423, a hogshead of wine in a warehouse of a third party was sold and a delivery order given to the purchaser. Held, not effectual as an acceptance. The court said: "There could not have been any actual acceptance of the wine by the vendee until the dock company accepted the order for delivery, and thereby assented to hold the wine as the agents of the vendee." So in *Gotts v. Rose*, 17 C. B. 236, the court said: "The plaintiff intended that five tons of the oil which he had at Humphrey's wharf should be delivered to the defendant, and he gave an order to the wharfinger to transfer that amount accordingly. Did that bind the goods, and was it equivalent to a delivery to the defendant? The wharfinger, in obedience to the plaintiff's order, did transfer five tons of the oil to the name of the defendant. Was that transfer operative until the defendant had agreed to accept it? I find no authority to show that a mere delivery of an order to the wharfinger, or any act done thereon by the wharfinger, has the effect of binding the vendee without his acceptance." And in *Farina v. Horne*, 16 M. & W. 119, the vendor gave the purchaser a delivery warrant issued by the wharfinger in possession of the goods, and the purchaser retained it, without using it or paying for the goods. Held, "that though there was sufficient evidence of the acceptance, if the goods had been delivered, there is none of the receipt." "This warrant is no more than an engagement by the wharfinger to deliver to the consignee, or any one he may appoint, and the wharfinger holds the goods as the agent of the consignor (who is the vendor's agent), and his possession is that of the consignee until an assignment has taken place, and the wharfinger has attorned, so to speak, to the assignee, and agreed with him to hold for him." "In the meantime, the warrant, and the indorsement of the warrant, is nothing more than an offer to hold the goods as the warehouseman of the assignee." Citing *Bentall v. Burn*, *supra*. In *Boardman v. Spooner*, 13 Allen, 353, it was held that the acceptance in Massachusetts of a bill of goods in a warehouse in New York, with an order on the warehouseman for their delivery, without notice to him, is not an acceptance on receipt of the goods, which will take the sale out of the operation of the Statute of Frauds. Citing *Bentall v. Burn* and *Farina v. Horne*, *supra*. In *Franklin v. Long*, 7 G. & J. 417, where there was a sale of a slave in jail for safe-keeping, accompanied by an order on the sheriff for his delivery, the court said: "The mere giving of the order for delivery and the acceptance of it by the agents of the plaintiffs, were not indeed an actual delivery and acceptance of the man himself, within the meaning of the 17th section of the Statute of Frauds, as the sheriff, who held him for the defendant, might have refused to deliver him, in which event there could not have been an actual acceptance of him by the plaintiffs or their agent. Nor if standing alone, without any acceptance of or assent to the order by the sheriff, with nothing given as earnest or in part payment, nor any note nor memorandum in writing of the bargain, would it have been a sufficient constructive delivery," etc. The court distinguishes the case from those of possession for a special purpose of the vendor, with acceptance of the order; and of ponderous goods and the exercise of acts of ownership by the vendee; and of symbolical delivery, as of the key of the warehouse; and where delivery is impossible, as in case of a cargo at sea. In *Williams v. Evans' Adm'r*, 39 Mo. 201, the facts were similar, but the parties went to the jail, and the jailer consented to deliver the slaves when called for by the vendee, and they were temporarily left in his custody. Here it was held that delivery and acceptance had taken place.

In *Zachrisson v. Poppe*, 3 Bosw. 171, the owner of logwood on ship orally agreed to sell it, he had entered it at the custom house to put it in bond, and afterward made withdrawal

Weaver v. Carnall.

entries ; he gave the purchaser a custom-house order for it, which the officers refused to recognize, because no logwood appeared on the books, belonging to plaintiffs. *Held*, no delivery. The court said : "A delivery by the plaintiff of an order, which did not give the defendants any legal control over the property mentioned in the order, is not, in contemplation of the law, a delivery of such property. If the defendants had agreed to accept the plaintiff's order upon the custom house as a delivery of the goods named in the order, and to take their risk of getting them withdrawn from the custom house or of shipping them without any formal withdrawal, then the defendants might be bound."

In *Shindler v. Houston*, 1 Comst. 270, WRIGHT, J., said, "in cases like these it would seem now to be necessary that the party having the custody of the goods, and who is the agent of the vendor, should recognize the order given to the purchaser, and assent to retain the goods for him."

In *Hollingsworth v. Napier*, 3 Cal. 182, the vendor delivered to his vendee a bill of parcels for goods in a public store, together with an order on the store-keeper for their delivery, and the vendee delivered the order, received the goods, paid the storage, marked the bales with his initials, and returned them to the custody of the store-keeper. *Held*, that the statute was satisfied.

In *Simmonds v. Humble*, 13 C. B. (N. S.) 258, hops in possession of the vendor's factor were sold by sample ; the buyer's agent attended at the warehouse, saw them weighed, and compared them with the sample, and adjusted some allowances ; *held*, sufficient. "The moment the contract was complete, the bailee became the bailee of the buyers."

We think the rule may be formulated as follows :

1. In case of specific ponderous or bulky articles, or those which are incapable of delivery, the terms of the contract having been settled, a symbolical delivery is sufficient.
2. Where such articles are in the vendor's actual possession, even such delivery is not indispensable, provided the intent of the parties to change the character of his holding from that of owner to that of bailee for the purchaser, is evidenced by acts of both parties.
3. Where such articles are in the hands of the vendor's bailee, the vendor's order on him for their delivery, given to and accepted by the purchaser, is equivalent to delivery and acceptance of the articles, if notified to the bailee and actually or impliedly assented to by him, but not otherwise.

WEAVER V. CARNALL.

(35 Ark. 198.)

Agency — to sign note — signing by sub-agent.

A. authorized B. to borrow money for him of C. and sign A.'s name to a note therefore. B. borrowed the money, and in his presence and at his request D. signed the note thus : "A. by D." *Held*, that A. was bound.

ACTION on a promissory note. The opinion states the facts. The defendant had judgment below.

Sandels, for appellants.

Du Val & Cravens, contra.

Weaver v. Carnall.

ENGLISH, C. J. This was an action on a promissory note, brought in the Circuit Court of Sebastian county, Fort Smith district, by William J. Weaver and Henry Pentzel, as administrators, with the will annexed, of George S. Birnie, deceased, against John Carnall and Thomas Lanigan.

The note sued on is as follows :

“\$500. Sixty days after date we jointly and severally promise to pay George S. Birnie, Esq., or order, five hundred dollars, for value received, with interest from date at the rate of one and one half per cent, per month.

“JOHN CARNALL,
“By W. B. SUTTON,
“THOS. LANIGAN.”

The complainant alleged, in substance, that defendants executed and delivered the note to George S. Birnie, who afterwards died, leaving a will, which was probated, and the persons named as his executors declining to qualify, plaintiffs were appointed by the Probate Court of Sebastian county, Fort Smith district, administrators, with the will annexed. With the complaint was filed a copy of the note, and the original held subject to the order of the court, and inspection of defendants.

Lanigan pleaded bankruptcy, and was discharged.

Defendant, Carnall, filed an answer with two paragraphs. The court, on motion of plaintiffs, required him to elect between them, and he elected to reply on the first paragraph, which is as follows ;

“Now comes the said defendant, John Carnall, and for answer to said complaint of said plaintiffs, saith that he did not make and deliver said promissory note, in said complaint of the plaintiffs set forth and described.”

[Omitting a matter of practice.]

Plaintiff then read in evidence without objection the following letter :

“HOT SPRINGS, ARK., *October 1, 1873.*

“MAJOR LANIGAN — *Dear Sir* — A letter of Mrs. Haynes', of date sixteenth ult., and inclosed in one of your envelopes, reached me here. Mrs. H. seems to me to be in distressed circumstances, and we must relieve her, if possible. I would like, if you will do so, to get \$500 from the bank, or from Mr. George T. Birnie (to whom I

am already indebted for many kindnesses), and I will sign a note with you for said amount, until we are in a condition to make you title, when you can pay it. Perhaps Mr. B. would let us have it at $1\frac{1}{2}$ per cent, as the woman must actually be very needy. If you can not advance it (and I hardly suppose you can willingly spare it now), get it and inclose to me at Little Rock, or in letter to her at Helena, care Tappan & Horner, and write me of so doing. You are authorized to sign my name to any such note.

“I believe that note for \$200, for Miss Jennie S. Spring, is about due; don't let it be protested. Very truly, yours,

“JOHN CARNALL.

“I write Mrs. H. to-night.”

Plaintiff then introduced William B. Sutton as a witness, who testified, in substance, as follows :

“That he signed said Carnall's name to said note, at the request of said Lanigan, said Lanigan and Mr. Birnie being in the office of the store some thirty yards distant. Said Lanigan brought witness the draft of said note, with pen and ink; said he was going to sign it, that he had authority from said Carnall to sign his name thereto, but thought it would look better for witness to sign Carnall's as he would sign his own. That witness then and there, in the presence of said Lanigan, signed the name of said Carnall, and then said Lanigan signed it afterward. That witness had no authority from said Carnall to sign said note; that witness and Lanigan were considered as partners at the time; that the money, he understood, was for private use; that it was not for the partnership business, and the money in no way went into the partnership business. Witness did not speak to Birnie upon the day the note was signed.”

Plaintiffs then called Thomas Lanigan as a witness, who testified that he received the \$500 from Mr. Birnie, and remitted it to Mrs. Haynes; did not recollect informing Carnall thereof by letter; and did not know whether he ever told him that the money had been sent to Mrs. Haynes.

Plaintiffs then called defendant Carnall as a witness, who testified as follows :

“That he, as agent and attorney for heirs of J. P. Spring, sold to said Lanigan certain property in Fort Smith for a residence for \$4,500; that \$2,000 was paid in cash, and the remainder was to be

Weaver v. Carnall.

paid when certain proceedings in court were had, so that title could be made of the interest of the minor heirs. That before that could be done, and before the balance was due, one of the adult heirs, Mrs. Haynes, wrote to said Lanigan, urgently requesting him to advance her \$500, because she was in great trouble, and said Lanigan referred said letter to him (Carnall), then at Hot Springs. That he wrote at once to Lanigan the letter read in evidence. Got no letter from Mrs. Haynes that he recollected, and no information of said Lanigan that the money had been sent. Long afterward, and just before he made a deed to Lanigan (June, 1874), and Lanigan paid him balance due, \$2,000, witness got information that the money had been sent Mrs. Haynes by said Lanigan. Witness had never seen the note to said Birnie before he settled with Lanigan, and understood Lanigan to say, on witness asking about it, that it was paid, and witness allowed it in settlement, and made deed to the property. Knew that he had gotten the money from Birnie, but did not know, or ask, if his (witness') name was signed to the note.

"Supposed, previously, from what he wrote him, that Lanigan had signed it as attorney. Did not know that Birnie had the note, with witness' name to it, for years afterward, and as soon as informed there was such a note, signed in such manner, by one not authorized, he utterly repudiated the same, and refused to pay it. Had never given any note at one and a half per cent per month to stand any length of time, and would not. Was under no obligations to Mrs. Haynes, and derived no benefit from the money whatever.

"That he never in any manner nor at any time ratified the execution of said note by Sutton. That after the agent of said Birnie spoke to him about it and exhibited it to him, witness wrote to said Lanigan, then absent, bitterly reproaching him for not having settled the note, as he supposed he had."

Plaintiffs after introducing the above evidence again offered the note in evidence, and on the objection of defendant the court excluded it.

No further evidence being offered, the jury returned a verdict in favor of defendant, and judgment was entered discharging him.

Plaintiffs moved for a new trial on the ground that the court erred in excluding from the jury the promissory note sued on:

the court overruled the motion, and they took a bill of exceptions and appealed.

[Omitting a question of practice.]

It seems that appellee authorized Lanigan to borrow \$500 of Birnie, and sign his name to a note therefor. Lanigan accordingly borrowed the money, and at his request and in his presence Sutton, his partner, signed appellee's name to the note. This was the act of the agent, and in legal effect the act of appellee, the principal, and not of Sutton, who did the mere mechanical act of signing appellee's name to the note by request of Lanigan.

An agent cannot delegate any portion of his power requiring the exercise of discretion or judgment; otherwise however as to powers or duties merely mechanical in their nature.

Hence, if empowered to bind his principal by an accommodation acceptance, he may direct another to write it, having first determined the propriety of the act himself, and it will bind the principal, though naming the delegate, and not the one exercising the power. *Commercial Bank of Lake Erie v. Norton*, 1 Hill. 501.

In the case cited the court said: "But it is said the agent could not delegate the power to accept the drafts. This is not denied, nor did he do so. The bills came for acceptance, and having as agent made up his mind that they should be accepted, he directed Cochrane, the bookkeeper, to do the mechanical part — writing the acceptance across the bills. He was the mere amanuensis. Had any thing like the trust which is in its nature personal to an agent, a discretion, for instance to accept what bills he pleased, been confided to Cochrane, his act would have been void. But to question it here would be to deny that the general agent of a mercantile firm could retain a carpenter to make a box, or a cooper to make a cask. The books go on the question whether the delegation be of discretion."

So in *Ellis v. Francis*, 9 Ga. 327, where a constable, a public agent, who could not delegate his authority, procured another person to make a return of *nulla bona* upon a *fi. fa.*, in his presence, and by his request, the return was held to be the act of the constable.

The court should have permitted the note to be read in evidence to the jury, with the evidence conducing to prove its execution by appellee, and under proper instructions from the court, they should have returned a verdict upon all of the evidence.

Peel v. January.

The judgment must be reversed, and the cause remanded, with instructions to the court below to grant appellant a new trial.

Judgment reversed and cause remanded.

PEEL v. JANUARY.

(35 Ark. 331.)

Jurisdiction — obtained by fraud — when conclusive.

In a suit on a judgment obtained by default in another State, the defendant pleaded that he was fraudulently induced to go within the other State for the purpose of serving process on him. *Held*, not a valid defense, in the absence of facts showing an excuse for not moving to set aside the service, and for acquiescing in the judgment.

ACTION on a judgment. The opinion states the facts. The plaintiff had judgment below.

J. D. Walker, for appellant.

Gregg, contra.

ENGLISH, C. J. This action was brought in the Circuit Court of Washington county by Dederick A. January and Jesse L. January, successors to the mercantile firm of D. A. January & Co., of St. Louis, against Samuel W. Peel, upon a judgment recovered by plaintiffs against defendant in the Circuit Court of St. Louis, Mo.

The transcript of the judgment, etc., which is the foundation of the action, exhibited with and made part of the complaint, shows that on the 22d of January, 1878, the plaintiffs commenced suit in the Circuit Court of St. Louis against defendant on an open account for goods, wares, and merchandise, etc.; that the writ issued, on the filing of complaint and bill of particulars, was made returnable on the first Monday of April, 1878, and that on the day of its issuance the 22d of January, 1878, it was served on the defendant personally, by the sheriff, in the city of St. Louis. At the return term defendant made default, and judgment was rendered against him for \$329.38 — amount of the account sued on — and for costs.

To the present action on the Missouri judgment, the defendant filed an answer, in substance, as follows :

That at the time of the commencement of the suit in the Circuit Court of St. Louis, and at the time of the rendering of the judgment therein, defendant was a citizen and resident of this State, and not a citizen or resident, or domiciled in the State of Missouri ; nor had he any property therein liable to seizure on execution, attachment or other process ; that he did not appear to said action in person or by attorney, and was not served with process, and had no notice of the pendency of the suit, other than the service on the 22d of January, 1878, of a summons issued out of the office of the clerk of the Circuit Court of St. Louis on that day.

That before the commencement of the suit in St. Louis, plaintiffs had sued defendant on the same cause of action in the Circuit Court of Washington county, in this State, which was pending when the St. Louis suit was commenced, and when the judgment was rendered therein.

That defendant was not indebted to plaintiffs in the whole amount sued for and recovered by the St. Louis judgment, and that \$120 of said account, for which the judgment was rendered, was incorrect and unjust.

That while said action was pending in the Circuit Court of Washington county, and defendant was resisting the same, and preparing his defense thereto, plaintiffs notified him that they would take the depositions of witnesses in the city of St. Louis on the 22d day of January, 1878, to be read as evidence on their part on the trial of said cause, and to then and there appear and cross-examine such witnesses.

Induced by this notice, defendant left his residence in Arkansas, and started to St Louis on the 19th ; reached there on the 21st, and was present in said city on the 22d of January, 1878, for the purpose of personally cross-examining such witnesses as plaintiffs might produce against him under said notice.

That after he was thus induced to go within the jurisdiction of the Circuit Court of St. Louis, plaintiffs, on the 22d of January, 1878, instituted their action against him in said court, upon the same demand on which the judgment sued on in this action was recovered, and upon which their suit in the Circuit Court of Washington county, in this State, was then pending, and caused him to be served with process, etc.

Peel v. January.

And so defendant says that plaintiffs, fraudulently intending to obtain jurisdiction of his person before, and to prosecute the action aforesaid, on which said supposed judgment was obtained, in the said Circuit Court of the city of St. Louis, fraudulently caused by the giving of the notice to take the depositions aforesaid, the personal presence of defendant within the jurisdiction of the said Circuit Court, on the 22d day of January, 1878, and at the time of the service of the said process in said suit upon him; and that thereby the jurisdiction of the person of this defendant, by the service of said process, issued and served on said 22d of January, 1878, in said action in which said supposed judgment was rendered in said Circuit Court of the city of St. Louis, by the acts and doings of said plaintiffs, as aforesaid, was fraudulently obtained, and that such judgment should be held null and void; wherefore defendant prays judgment.

The plaintiffs demurred to the answer on the following grounds:

"1. Because the answer attempts to set up fraud in procuring jurisdiction of defendant's person, and the facts by him stated show that he went voluntarily within the jurisdiction of said Circuit Court of St. Louis.

"2. Because said answer does not deny that said plaintiffs have a just and legal cause of action against said defendant.

"3. Because said answer admits the validity and justness of more than half of plaintiffs' claim, and attempts to defeat the whole action by alleging that only \$120 of their claim is unjust.

"4. Because said answer is otherwise insufficient in law."

The court sustained the demurrer, and defendant resting, judgment was rendered against him in favor of plaintiffs for the amount of the judgment sued on, and defendant appealed.

1. Taking the allegations of the answer to be true, as admitted by the demurrer, the personal presence of appellant within the jurisdiction of the Circuit Court of St. Louis, and the service of process on him there, were obtained by a fraudulent contrivance of appellees.

True, he went there voluntarily, but if induced to go there by a false notice — a notice intended to bring him there for the purpose of serving him with process, and not designed in good faith to afford him an opportunity to cross-examine witnesses, it was a fraud upon the jurisdiction of the St. Louis Circuit Court.

In *Carpenter v. Spooner*, 2 Sandf. 717, defendant went voluntarily

into the city of New York, where he was induced to go by means of a false letter which plaintiff caused to be written to him, for the purpose of inducing him to go there, that he might procure service of a writ upon him.

An application was made to set aside the service, and the court said: "This court will not sanction any attempt to bring a party within its jurisdiction by fraud and misrepresentation. And where by a false statement or fraudulent pretense a party is brought within the jurisdiction and there served with process, the service will be set aside. We recollect a case where a party was entrapped into the State out of another State, and then served with process, and there the service was set aside."

In *Goupil v. Simonson*, 3 Abb. Pr. 474, the sheriff induced Simonson to come within his bailiwick by a false statement that his son was imprisoned there, and then served an order of arrest upon him, and he was, on motion, discharged. The court said: "It is but too apparent that he was enticed within the bailiwick of the sheriff of Kings county that he might be arrested. It is manifest that the whole proceeding was a trick for the purpose of giving the sheriff of Kings county an opportunity to arrest the defendant"—and the court approved the ruling in *Carpenter v. Spooner*, *supra*.

In *Luttin v. Benin*, 11 Mod. 50, Lord HOLT, after stating that if a man is wrongfully brought into a jurisdiction and thereby lawfully arrested, he ought to be discharged, adds, "for no lawful thing founded upon a wrongful act, can be supported."

And Chief Justice SHAW, in *Isley v. Nichols*, 12 Pick. 276, said: "These cases [reviewed by him] seem to establish the general principle, that a valid and lawful act cannot be accomplished by any unlawful means; and whenever such unlawful means are resorted to, the law will interpose and afford some suitable remedy, according to the means of the case, to restore the party injured by these unlawful means to his rights."

In that case, it was held that where an officer unlawfully broke open the outer-door of a dwelling, he could not make a lawful attachment of goods therein.

No doubt, upon the showing made by appellant's answer, the Circuit Court of St. Louis would have set aside the service of the summons made upon him, had he made application for that purpose before judgment.

Peel v. January.

Nor by the common law, which we presume to be in force in the State of Missouri, in the absence of evidence to the contrary, would the making of such a motion have been an appearance to the action. *Ferguson v. Ross*, 5 Ark. 517.

II. The purpose of the answer was to defeat the whole action upon the judgment on the ground that it was recovered on service of the writ procured by fraud of the appellees.

This suit is upon a judgment of a court of record of the State of Missouri, rendered upon a cause of action within its jurisdiction, and upon actual personal service of the writ on appellant; and the suit was brought upon the law side of the Circuit Court of Washington county, in this State.

Sec. 1, Art. IV, of the Constitution of the United States provides that, "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The act of Congress of May 20, 1790, provides the manner of authenticating the records and judicial proceedings of the States, and declares that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given them, in every court within the United States as they have, by law or usage, in the courts of the State from whence the said records are and shall be taken." Gantt's Dig., p. 136.

Where a suit is brought in a court of one State upon a judgment recovered in a court of another, and jurisdiction of the subject-matter and of the person is made to appear, the judgment is conclusive as to other matters. *Thompson v. Whitman*, 18 Wall. 457; *Barkman v. Hopkins*, 11 Ark. 157; *Buford v. Kirkpatrick*, 13 id. 33; *Kimball v. Merrick*, 20 id. 12.

If, to a suit upon the judgment in Missouri, where it was rendered, appellant could avail himself of the defense that it was recovered by fraud, the same defense is allowable to a suit on the judgment in a court of this State.

As above remarked, in the absence of evidence to the contrary, the common law is presumed to be in force in Missouri.

Domestic judgments, under the rules of the common law, could not be collaterally impeached or called in question if rendered in a court of competent jurisdiction.

✓ It could only be done directly by writ of error, petition for new trial, or by bill in chancery. Third persons only, says Saunders, could set up the defense of fraud or collusion, and not the parties to the record, whose only relief was in equity, etc. Common-law rules placed foreign judgments upon a different footing, etc.

✓ Subject to qualification that they are open to inquiry as to the jurisdiction of the court which gave them, and as to notice to the defendant, the judgment of a State court, not reversed by a superior court having jurisdiction, nor set aside by a direct proceeding in chancery, is conclusive in the courts of all the other States where the subject-matter of the controversy is the same. To a suit in a court of one State upon a judgment of a court of another State, a plea that the judgment was obtained by fraud, is not allowed. The only remedy is by bill in chancery.

✓ Such is the decision of the Supreme Court of the United States (whose peculiar and superior province it is to construe the Constitution and laws of the United States) in *Christmas v. Russell*, 5 Wall. 290.

This ruling is also sustained by decisions of the State courts. *Benton v. Burgot*, 10 S. & R. 240; *Granger v. Clark*, 23 Me. 128; *Anderson v. Anderson*, 8 Ohio, 108; *McRae v. Mattoon*, 13 Pick. 53; *Sanford v. Sanford*, 28 Conn. 6.

✓ *Pearce v. Olney*, 20 Conn., 544, illustrates the rule and the practice under the common law. A judgment was obtained in New York, and an action was brought upon it in Connecticut; defendant filed a bill in chancery to enjoin the prosecution of the action on the ground that the judgment had been obtained by fraud—that he owed the plaintiff in the judgment nothing, and though served with process in New York, he was prevented from making defense to the suit by the fraudulent conduct of the plaintiff. Upon the facts of the case, the plaintiff was enjoined from further prosecuting his action of debt on the judgment recovered in New York. Justice HINMAN, who delivered the opinion of the Supreme Court of Connecticut, in the case, said: “The object of injunctions to stay proceedings at law is, to prevent injustice by an unfair use of the process of the court. They are granted on the ground of the existence of facts, not amounting to a defense to the proceeding enjoined against, but of which courts of equity have jurisdiction, and which renders it against conscience that the party enjoined should be permitted to proceed in the cause. It is well

Peel v. January.

settled that this jurisdiction will be exercised, whenever a party, having a good defense to an action at law, has had no opportunity to make it, or has been prevented by the fraud or improper management of the other party, from making it, and by reason thereof a judgment has been obtained which it is against conscience to enforce. Indeed, this falls directly within, and is but an illustration of, the general rule that equity will interfere to restrain the use of an advantage gained in a court of ordinary jurisdiction, which must necessarily make that court an instrument of injustice, in all cases where such advantage has been gained by the fraud, an accident, or mistake, of the opposite party." Further on in the opinion, after stating that complainant in the bill had been sued in New York on a contract with which, personally, he had nothing to do, and upon which he was not personally liable, and judgment had been obtained against him, on service of process, and without defense, Justice HINMAN said: "If this was all, complainant would have no remedy, however unjust it might be to compel him to pay that judgment. Still, as he was duly served with process in that suit, it was his duty to make defense in it; and an injunction ought not to be granted to relieve him from the consequences of his own neglect. It is found however that he not only had a good defense, but it was his intention to make it, and he would have made it, had he not been led, by the conduct of the attorney for the plaintiff in that suit, to suppose the suit was abandoned," etc. *Rogers v. Gwinn*, 21 Iowa, 58, was a similar case. Rogers sued Gwinn, who was a resident of Iowa, in an action for slander, in Kentucky; obtained personal service of process, and Gwinn entered the plea of not guilty. It was positively agreed between him and plaintiff, Rogers, that plaintiff had no cause of action, and that the action should be dismissed, and on this assurance, Gwinn returned to Iowa. Afterward, in his absence, and without notice, Rogers proceeded *ex parte* with the suit, and obtained a judgment against him for \$700 in damages, and thereafter brought an action against him on the judgment in Iowa. He filed an equitable answer, setting up the above facts to show that the judgment was obtained against him by fraud; the cause was tried by the court, and finding and judgment in his favor, and Rogers appealed. Justice DILLON, who delivered the opinion of the Supreme Court, said: "Our statute allows equitable defenses to be pleaded to an action at law. *Rev.*, §§ 2617, 2889. Under the answer filed in this case, the defendant

is entitled to the same relief which the same facts would, under the former practice, have authorized, if he had made them the ground of a bill in chancery, directly assailing the judgment. The circuitous practice of a bill in chancery to enjoin the law action and for relief is, under the revision, no longer necessary, if indeed, it be any longer, strictly speaking, proper."

In *Dobson v. Pearce*, 12 N. Y. (2 Kern.) 156, cited by Justice DILLON to support the views of the Supreme Court of Iowa, the suit was upon a judgment, and the answer was, that it was obtained by fraud. The Court of Appeals of New York, by Justice ALLAN, said: "It is unquestionable that a Court of Chancery has power to grant relief against judgments when obtained by fraud. Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not avail himself at law, but was prevented by fraud, or accident, unmixed with any fault or negligence in himself or his agents, will justify an interference by a Court of Equity."

Under our present judiciary system, the functions of the courts of common law and chancery are united in the same court, and the distinction between actions at law and suits in equity, and the forms of all such actions and suits, are abolished, and the defendant may set forth, by answer, as many defenses as he may have, whether they be such as have heretofore been denominated legal or equitable, or both. §§ 69, 150. The Code also authorizes affirmative relief to be given to defendant in an action by the judgment. § 274.

The intent of the legislature is very clear, that all controversies respecting the subject-matter of the litigation should be determined in one action, and the provisions are adapted to give effect to that intent.

Whether therefore fraud or imposition in the recovery of a judgment could heretofore have been alleged against it collaterally at law, or not, it may now be set up as an equitable defense to defeat a recovery upon it.

Under the head of equitable defenses are included all matters which would before have authorized an application to the Court of Chancery for relief against a legal liability but which, at law, could not have been pleaded in bar. The fact alleged by way of defense in this action would have been good cause for relief against the judgment in a Court of Chancery, and under our present system are therefore proper matters of defense; and there was no necessity

Peel v. January.

or propriety for a resort to a separate action to vacate the judgment. In Connecticut, although law and equity are administered by the same judges, still the distinction between these systems is preserved, and justice is administered under the head of common law, and chancery jurisdiction by distinct and appropriate forms of foreclosure, and hence, as it was at least doubtful whether at law the fraud alleged would bar a recovery upon the judgment, a resort to the chancery powers of the court of that State was proper, if not necessary.

As in Connecticut, under our present Constitution (art. 7, §§ 11, 15), the Circuit Courts are vested with both common-law and chancery jurisdiction, until the general assembly shall deem it expedient to establish separate courts of chancery.

If a party has a legal cause of action, he brings his suit on the law side of the court, and if an equitable cause of action, it is brought on the chancery side.

Under the Civil Code, if a defendant to an action at law has a defense cognizable only in equity, he is not obliged as under the former practice, to suffer judgment at law, and file a bill for injunction, but he may make his answer serve the purpose of a bill, and have the cause transferred from the law to the equity side of the court. Gantt's Dig., § 4465.

Here the action was at law, not upon an open demand, but upon a judgment recovered in another State, which appellees sought to enforce in this State. The answer was in the form of a plea in bar, with a prayer for judgment.

It should have been framed like a bill in equity for an injunction against the enforcement of the judgment, stating the facts, and praying relief. As a plea in bar, appellants had no right to reply. If it had been properly framed as a bill for relief, the case should have been transferred to the chancery side of the court, and appellants allowed to reply to its allegations, or demur. This is the proper Code practice under our judicial system.

But passing over the form of the answer, it failed to allege that appellant made any application to the court in St. Louis to set aside the service of the writ complained of, and gives no excuse for not doing so, not even that it was inconvenient for him to have made the application.

The service was not void, but voidable, and if acquiesced in by appellant, valid.

✓ *Dunlap v. Cody*, 31 Iowa, 260 ; s. c., 7 Am. Rep. 129, relied on by counsel for appellant, differs in some of its features from this case. Dunlap & Co., of Illinois, held a note on Cody, of Iowa, which was barred by the Statute of Limitations of the latter State. To avoid the bar, they induced him, by a falsehood, to go into Illinois, a thousand miles from his home, where, having prepared a suit upon the note, they caused the sheriff to serve process upon him immediately on his arrival in the cars. They afterward obtained judgment against him without defense, and thereafter sued him in Iowa upon the judgment. By equitable answer (as in *Rogers v. Gwinn, supra*), he pleaded that the judgment was obtained by fraud. The learned judge who delivered the opinion of the court cites a number of adjudications to show that a service of process so obtained is not to be countenanced by the courts, but in cases cited it appears that the service was set aside by the courts out of which the process issued. Cody was excused for not making application to the Illinois court to set aside the service, on the ground that it was so far from his home, and on the further ground that such an application might have been treated by the Illinois court as an appearance to the action ; that it would be so treated in Iowa.

✓ In the absence of evidence, we do not know what the statutes of Missouri are, but neither by the common law nor by our practice, would an application to a court to set aside a service unfairly obtained be treated as an appearance to the action.

In the answer of appellant, he gives no excuse whatever for his failure to apply to the St. Louis court to set aside the service, nor does he claim to have had any defense except to a smaller portion of the debt.

Upon the whole, appellant has neither followed the former chancery nor the Code practice in making his defense, and we cannot, upon principle, reverse the judgment for the purpose of allowing him to make a better case.

Judgment affirmed.

PACKARD V. TAYLOR.

(35 Ark. 408)

Carrier — liability of connecting — act of God — unseaworthy vessel.

A consignee of goods by a line of connecting carriers may maintain an action for their loss against the carrier in whose hands the loss happens. A carrier by water is not excused from liability for loss by the act of God operating upon an unseaworthy vessel, when such act would have proved harmless to a seaworthy vessel.

ACTION for damage to goods. The opinion states the case. The plaintiff had judgment below.

M. L. Jones, for appellants.

McCain, contra.

EAKIN, J. Taylor, Cleveland & Co., merchants at Pine Bluff, brought this action at law against appellants, Packard & Hammett, owners of the steamboat "Lizzie," to charge them for damages to goods which had been delivered to said steamer at Little Rock, to be transported to Pine Bluff, and which had been injured by the sinking of the steamer in the Arkansas river, before her departure from the wharf. Bills of particulars, describing the goods, were filed, and the damage sustained sufficiently proved.

The defenses set up by the answer may be reduced to three :

[Omitting the first.]

2. That defendants made no contract with plaintiffs for the carriage of the goods, but received them from the St. Louis and Iron Mountain Railroad Company, to be carried in its behalf, and to which alone they are responsible.

3. That defendants were guilty of no negligence, nor misconduct, but that the accident happened solely from the act of God, and the perils of the river.

Upon trial by a jury, there was a verdict for \$750 damages, and judgment in plaintiff's favor accordingly. There was a motion for a new trial, which was overruled. A bill of exceptions was taken, and an appeal granted.

It appears from the record, that the plaintiffs below had purchased in Boston and New York, bills of goods which had been consigned to said railroad at St. Louis. They were received there, by the railroad company, for transportation to the owners at Pine Bluff, a point upon the Arkansas river below Little Rock, at which latter place the railroad crosses the river. No bill of lading was given. The railroad company had a contract with the steamer "Lizzie," through her owners, who were common carriers by water, to take down all goods consigned to Pine Bluff, dividing the freight in a certain proportion. Upon their arrival at Little Rock the goods were placed in the charge of a transfer company which delivered them to the clerk of the "Lizzie," on the wharf. The vessel, on her last trip, had been injured by a snag. She was brought to the wharf for repairs. A dock had been run under her, and pumped out so far as to elevate the injured portion of the hull, and the carpenter had cut two holes in her bottom to be repaired with new timber, one about four feet by twelve inches, and the other about three feet by ten inches. Whilst the boat was thus on the dock the goods were taken aboard. The weather was bad. It had been raining, and there was some wind. The boat was lying with the forward portion upon the dock, and the stern held to the bank by a slack chain. Whilst in that position, by some accident the dock slipped out, and the vessel sank to the bottom, damaging the goods. The immediate cause of the accident is not certainly known, but the proof tends to show that about that time a small whirl of wind passed across the river, drove her stern against the bank, and broke the chain in the rebound, thus shaking her from the dock.

There was proof that it was necessary to put the goods on board to protect them from rain, that the weight of them was calculated to steady the dock, and that it was the practice to load freight, sometimes, on vessels whilst upon dock undergoing repairs. These are the material facts affecting this case. The amount of the damage was properly proved by direct testimony.

The instructions given on plaintiff's motion, against defendant's objection, are the following: 1. Where goods are shipped to be transported by successive carriers, the carrier in whose possession they are when destroyed, or injured, is liable as such to the owner or consignee for the loss; and further, in effect, that: 3. The burden of proof is on the carrier to exempt himself from damages; 4. Defendants are bound to show that the injury resulted from the act

Packard v. Taylor.

of God ; 6. If the goods were damaged by any defect in the vessel which rendered her unseaworthy, the defendants are liable ; 7. The jury may find interest at six per cent per annum on damages ; 8. Defendants may be sued as part owners, although there were other part owners and partners ; 9. Any act or omission of the carrier, or any thing which may befall his boat, and occasion damage to property, is regarded by the law as negligence, unless it is the act of God or the public enemies ; 10. If the steamboat received goods for carriage at Little Rock, marked to plaintiffs, and belonging to them, the law would imply a contract to carry and deliver them.

To which the court, of its own motion, and likewise against defendant's objection, added this: "Common carriers are not excused from liability by accidents caused by the action of the elements (usually denominated the acts of God), which would not affect a perfectly seaworthy vessel."

For defendants, the court instructed:

1. That if the accident to the "Lizzie" was the result of any such act of God as lightning, storms, tempests, whirlwinds, etc., and was the immediate cause of the damage to the goods, the defendants are not liable.

5-6. They are not liable if the goods were damaged from no negligence on their part, but by reason of an unforeseen and unavoidable accident, occasioned by a sudden gust of wind ; provided, the officers used the usual and ordinary care and prudence in regard thereto.

9. Plaintiffs must prove that defendants are common carriers, and received the goods as such, under contract, express or implied, with plaintiffs ; and that they were damaged by negligence or carelessness of defendants as such carriers.

10. If the jury found that the railroad received the goods at St. Louis to be transported to Pine Bluff, and it was understood that the goods were to be carried from Little Rock to Pine Bluff on the steamboat "Lizzie" under the contract made with the consignee or shipper, then the said steamer "Lizzie" became a part of the continuous line of carriers from St. Louis.

And the court refused to instruct for defendants:

2. That if the boat was on the dock for repairs, securely and sufficiently fastened for the purpose, and it was customary to place goods or freight on steamboats whilst undergoing repairs, and upon docks, for ballast, and that the boat, whilst in this condition and

so ballasted, was torn from her fastenings and made to take water and sink, by a sudden and violent gust of wind, whereby damage ensued to the goods, they will find for defendants.

3. If they believe that there was another joint owner of the boat, so registered and held out to the world, the plaintiffs, having failed to make him a party, could not recover in this action, and to find for defendants.

4. If they believed that there was a contract for carrying freights from St. Louis to Pine Bluff, between the railroad on one part and the boat-owners on the other, by which the former was to give through bills of lading, and the steamer was to carry goods under that contract, and these goods were so being carried, the defendants are not liable in this action.

It will be seen that a portion of the objections to the instructions given for plaintiffs, and some of the instructions asked by defendants and refused by the court, are based upon this assumed principle, that if the defendants were acting only under a contract with the railroad to carry for the corporation freights which it had undertaken to deliver at Pine Bluff, they could only be held to answer at the suit of the railroad, and not of the plaintiffs.

But it must not be lost sight of that defendants were themselves common carriers between Little Rock and Pine Bluff, carrying for the railroad only as a part of their general business. The contract had only the effect of a contract between common carriers, for increase of custom to the steamboat line, securing it, in competition with other carriers upon the same route. It did not relieve the steamboat owners from any of the general responsibilities of common carriers with regard to goods so transferred to them for carriage by the railroad. They were not the private agents of the railroad company, but were carrying on a general business for the benefit of any one who might employ them. They are bound by the same obligations and to the same persons which bind successive common carriers receiving goods from each other and transmitting them along the route to the point of ultimate destination. There were no bills of lading in this case restricting or defining the several liabilities of the railroad and the steamer "Lizzie." The general law must govern.

The carrier's obligation to keep and carry safely is founded on the custom of the realm at common law, and is independent of contract, being imposed by law for the protection of the owner, and

Packard v. Taylor.

founded upon public policy and commercial necessity. Chitty on Carriers, 34, 35. There may be a special contract also, not indeed superseding that implied by law, which still underlies the other, but restricting or modifying it in some particulars in a manner which the courts may not consider unreasonable or subversive of the general policy. *Id.* But in the absence of any such contract the carrier is an insurer—liable not only for negligence, but even for inevitable accident, not occasioned by act of God. In this case there is no question of public enemies.

We are cited to the cases of *Bank of Kentucky v. Adams Express Co.*, 3 Otto, 174, and *Newell v. Smith*, 49 Vt. 255, as authority to sustain the position that the contract of affreightment being with the railroad, the defendants cannot be sued upon it. The first was a suit against an express company to recover the value of a package of money which defendant had received to be delivered to plaintiff at Louisville. The express company had employed the services of a railroad to transport its packages, which were accompanied by and remained under the control of its messenger. An accident happened to the road by which the car was burned and the package destroyed. The defense set up was that the express company having contracted to be held only to the liability of a common bailee for hire, in case of loss by fire was not answerable for the negligence of the employees of the railroad, over which it had no control; and so it was held by the Circuit Court. This was reversed, on appeal to the Supreme Court of the United States, the latter tribunal holding that the railroad company was the agent of the express company, and that the latter must answer for the negligence of the former. The question of the liability of the railroad company to the consignees of the package would be analogous to this, but it did not arise. The court however *arguendo* took this liability for granted, upon the authority of *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, and say: "Granting that the plaintiffs can sue the railroad company for the loss of the packages through its fault, their right comes through their contract between it and defendants. They must claim through that. Had the packages been delivered to the charge of the railroad company, without any stipulation for exemption from the ordinary liability of carriers, it would have been an insurer both to the express company and to the plaintiffs." 3 Otto, 184.

In the case here before us, the goods were taken by the St. Louis,

Iron Mountain and Southern Railway Company, without an express contract, to be carried to Pine Bluff, and were delivered to the defendants at Little Rock, as common carriers, to be transported to their destination, without any stipulation for exemption from the ordinary liability of carriers. According to the principle above announced, the owners of the "Lizzie" would thus become insurers both to the St. Louis, Iron Mountain and Southern Railway Company, and to the plaintiffs. It is true however that in 3 Otto the case is stated hypothetically.

The case in 49 Vermont, *supra*, goes only to fix the liabilities of a carrier who expressly contracts to deliver goods at a destination beyond the terminus of his own road, for the negligence of any connecting road in the line of transportation.

This court has held that this liability for loss by a connecting carrier may be repelled by express stipulation. *Taylor v. Little Rock, M. R. and T. Railroad Co.*, 32 Ark. 393. But neither the latter case nor the case from Vermont conflicts with the principle announced in 6 Howard, *supra*, that the consignee of goods may maintain action against the carrier in whose hands the loss happens, through the rights of the carrier originally bound.

Although the English courts have adopted the principle that a carrier, who receives goods to be conveyed to a point beyond the terminus of his own route, is liable for losses whilst in the hands of connecting carriers, and have even held that in such cases the subsequent carrier cannot be held liable by the owner, yet the American courts have taken a different view. See the question discussed and authorities cited in Redfield on Railways, § 162 and notes.

I have not met with any American case absolving the connecting carrier from liability to the consignee, although the contract may have been made with a preceding one on the route.

There are some cases which hold the connecting carriers entitled to all exemptions and qualifications which the original carrier had secured for itself by special contract, thus limiting its common-law liability. Such was the case of *Manhattan Oil Co. v. Camden & Amboy R. R.*, 52 Barb. 72, but they go no further. Even in England the principle seems confined to cases where the first company has expressly contracted to deliver at the point of destination, and some learned judges reject it altogether. Redfield, *supra*. Justice REDFIELD, in the case of *Farmers and Mechanics' Bank v. Cham-*

Packard v. Taylor.

plain Trans. Co., 23 Vt. 209, considered that this was pushing the law of carriers to an absurd extent ; and considered the better and more just and rational rule to be, that in the absence of a special contract, each carrier is only liable for the extent of his own route, and the safe storage and delivery to the next carrier. And to the same purport are a vast concourse of American decisions.

The court did not err in its instructions or refusals on this point.

All the other instructions are either sustained or rendered harmless to defendants by the plain and palpable showing from the evidence that they received the goods without having at hand any seaworthy vessel or place to store the goods out of the weather. A steamer with two great holes in the hull, which could not live five minutes on the calmest water, is, although supported on a dock, held under her by a chain, not such a vessel as it was the duty of defendants to furnish. There is no proof of any act of God which would have affected any vessel which would have floated at all. The defendants, in putting goods upon her, took all the risks, which were not lessened by any example of other carriers in other ports. They took risks also. It might have held the boat more steadily on the dock to load the freight upon her, but the owners of the goods were not interested in repairing the boat, and it was a perversion of them to use them for such purposes. It caused their loss. The act of God which shook the dock from under the vessel was not the immediate cause of the damages. It was the holes in the vessel, admitting torrents of water as soon as it touched the surface. The defendants should not have received the goods, or should have stored or protected them until the steamer could be made seaworthy. In carrying them on board a vessel in that condition they made their safety depend on the strength of a chain or the want of agitation in the air. They were not bound to receive the goods until they were ready to engage in their transit, and ought not to have done so without means of keeping them safely. It is the first duty of a carrier by water to provide and have ready boats suitable for the purpose.

Under no proper instructions could the jury have found a verdict upon the evidence in this case for defendants.

It is useless therefore to inquire critically concerning the instructions. Suffice it to say they were on the whole favorable to defendants, and that in any view the verdict was not only right, but so inevitable that any other would be set aside.

There are other points made on the motion for a new trial which we have duly considered, but deem it unnecessary to discuss, as they would not affect the result.

Judgment affirmed.

LEEMAN V. STATE.

(35 Ark. 428.)

Criminal law — extortion — corrupt intent.

A corrupt intent is essential to constitute the crime of extortion, and such intent is sufficiently charged by the use of the word "extorsively."

CONVICTION of extortion. The opinion states the case.

Granger, for appellant.

Henderson, attorney-general, *contra*.

HARRISON, J. The appellant James H. Leeman, was indicted for malfeasance in office. The indictment charged that he, being judge of the Probate Court of Logan county, did on the 22d day of April, 1879, and at the April term, 1879, of said court, unlawfully, and willfully and extorsively, charge, demand and receive from one C. F. Wood, the sum of two dollars as a fee for, as such judge, examining and passing upon his account-current as administrator of the estate of H. C. Williams, deceased; "a greater fee," it alleged, "than is allowed by law."

He was tried and convicted, and after a motion for a new trial had been overruled, judgment of a motion from office was rendered against him.

The evidence was, that the defendant was judge of the Probate Court of Logan county, and on the 22d day of April, 1879, at the April term of the court that year, C. F. Wood, the administrator of the estate of H. C. Williams, deceased, filed in open court an account-current of his administration, when the defendant, after looking over the account, said to him: "Mr. Wood, I consider that you owe me two dollars." Wood said to him that he under-

Leeman v. State.

stands the law which allowed the probate judge a fee of two dollars for examining and passing upon an administrator's account had been repealed, to which the defendant replied that he thought the repealing act unconstitutional, and he had been charging the fee, and was going to test the constitutionality of the act, and said if it should be decided to be constitutional he would pay the fee back to those who paid it, and Wood then paid him the two dollars.

The court instructed the jury against the objection of the defendant, as follows :

“The defendant is indicted for malfeasance in office. The act charged against him as constituting the malfeasance is this : That on the 22d day of April, 1879, he, being the judge of the Probate Court of Logan county, and while acting as such judge, at the April term, 1879, did unlawfully, willfully and extorsively charge, demand and receive from one C. F. Wood, as administrator of the estate of H. C. Williams, deceased, two dollars as a fee due him as such judge of said court, for services performed by him in examining and passing upon the account-current of said C. F. Wood as administrator of said estate.

“You are instructed that after the 5th day of March, 1879, no fee of any amount was allowed by law to a Probate judge for the services stated ; and for a Probate judge to charge, demand, or receive a fee for such services after that date, was an unlawful act. The word unlawfully, as used in this indictment, simply means that there was no authority of law for the defendant to commit the act with which he is charged. Willfully means intentionally ; an act done by design ; an act which proceeds from the will. Extorsively charging, demanding and receiving, means that the charging, demanding and receiving was done under color of his office, and for services for which nothing is allowed, or when none is due. Malfeasance is defined to be the performance of some injurious act which the party had contracted not to do, or had no right to do. The intent, whether corrupt or otherwise, with which the fee was taken, if taken as alleged, is a matter of no importance. It is the wrongful charging, demanding and willful taking, under color of office, a fee for an act for which the law provides no fee, that constitutes the offense. Ignorance of the law is no excuse or defense. Every one is presumed to know the law.”

The defendant asked the following instructions, which the court refused to give:

“1. If the jury believe from the evidence that the defendant took the fee alleged in the indictment, but at the time believed he was entitled to it, and that he did not act corruptly in the matter, but intended to pay the money back to Wood if he should become convinced he was not entitled to it, they must acquit the defendant.

“2. Unless they find from the evidence that the defendant has been guilty of corruption, gross immorality, criminal conduct, malfeasance, misfeasance or nonfeasance in office, they must acquit him.

“3. And unless they believe from the evidence that defendant has been guilty of extortion they must acquit him.”

It is enacted by § 1470, Gantt's Digest, that “if any officer shall charge, demand or receive any more or greater fees for his services than are allowed by law, or shall demand, charge or receive any such fees without having performed the services for which the same are charged, such officer for every such offense shall forfeit to the party injured, or against whom the same may be charged, the amount of fees illegally charged, and five dollars for each item illegally demanded, charged or received, with costs, to be recovered by action, and shall also be subject to an indictment for extortion.”

And it is provided by the act of March 9, 1877, that upon the conviction of any county or township officer for incompetency, corruption, gross immorality, criminal conduct amounting to a felony, malfeasance, misfeasance or nonfeasance in office, a part of the sentence shall be his removal from office.

“Extortion is,” says Blackstone, “an abuse of public justice, which consists in any officer's unlawfully taking by color of his office from any man any money or thing of value that is not due him, or more than is due, or before it is due.” 4 Bl. Com. 141. As defined by Bishop, it is “the corrupt demanding or receiving by a person in office of a fee for services which should be performed gratuitously; or where compensation is permissible, of a larger fee than the law justifies, or a fee not due.” 2 Bish. Crim. Law, § 390. The latter author says: “No act carefully performed from motives which the law recognizes as honest and upright is punishable as a crime. And it has always been held that extortion proceeds from a corrupt mind.” Id. 396. And Wharton says that “both by statute and at common law it is necessary that the taking should be willful and corrupt.” 3 Whart. Crim. Law, 2509.

Leeman v. State.

The language of the statute of New Jersey upon the subject of extortion is: "If any justice or other officer shall receive or take by color of his office any fee or reward whatever not allowed by the laws of this State for doing his office, and be thereof convicted, he shall be punished," etc. The Supreme Court of that State, remarking upon the statute, in the case of *Cutter v. State*, 7 Vroom, 125, say: "On the part of the State it is argued that this statute is explicit in its terms, and makes the mere taking of an illegal fee a criminal act, without regard to the intent of the recipient. Such undoubtedly is the literal force of the language, but then, on the same principle, the officer would be guilty if he took by mistake or inadvertence, more than the sum coming to him. Nor would the statutory terms, if taken in their exact signification, exclude from their compass an officer who might be laboring under an insane delusion. Manifestly therefore the terms of this section are subject to certain practical limitations. This is the case with most statutes couched in comprehensive terms, and especially with those which modify or otherwise regulate common-law offenses. In such instances the old and new law are to be construed together; and the former will not be considered to be abolished except so far as the design to produce such effect appears to be clear. In morals, it is an evil mind which makes the offense, and this as a general rule has been at the root of the criminal law. The consequence is that it is not to be intended that this principle is discarded merely on account of the generality of statutory language. It is highly reasonable to presume that the lawmakers did not intend to disgrace or to punish a person who should do an act under the belief that it was lawful to do it."

The reasoning of the court is, to our mind, conclusive. There can be no question, we think, that the general words of our statute do not preclude an inquiry as to the motive or intent, the same as at the common law.

By the act of December 13, 1875, in relation to the fees of officers, a fee of two dollars was allowed the judge of the Probate Court for examining and passing upon the account-current of an administrator, executor or guardian; but this provision of the act was expressly repealed by an act passed March 5, 1879.

The defendant may have honestly, but mistakenly, thought that the fee given by the act of 1875 was an emolument of his office of which he could not be deprived during his term; and though his

ignorance of the repealing act, or if its effect would not alone excuse him, there would be wanting, if he so supposed, that bad motive or evil intent necessary to make the act of demanding or taking it criminal.

The instruction given by the court, as it excluded all inquiry by the jury as to the defendant's motive or intention, was therefore erroneous. The first of those asked by the defendant was the converse of that, and should have been given. The others were too vague and indefinite to serve the purpose of an instruction, and were properly refused.

It is objected by the appellant that it was not charged in the indictment that the money was corruptly taken.

The corrupt intent was substantially and sufficiently averred by the use of the word *extorsively*. The technical words in an indictment for extortion at common law are "extort" and "by color of office." 2 Bish. Crim. Proc., § 320; *Jacobs v. Commonwealth*, 2 Leigh, 709; 2 Chitt. Crim. Law, 298, 299.

And it is objected also, that it was alleged that the fee was greater than allowed by law, but how much greater was not alleged.

No fees at all are allowed to judges of the Probate Court, and the defendant could not fail to understand from the indictment the sum he was charged with having extorsively taken.

The indictment was sufficient, but for the errors above mentioned, a new trial should have been granted.

The judgment is reversed and the cause remanded, with instruction to the court below to grant the defendant a new trial, and for further proceedings.

Judgment reversed, and cause remanded.

ADLER V. STATE.

(35 Ark. 517.)

Bail — confinement of principal in another State for insanity.

In an action on a bail bond it is no defense to the sureties that the principal at the time fixed for appearance was and still is insane and confined in an insane asylum in another State. (See note, p. 53.)

ACTION on a bail bond. The third answer was as follows: "III. And for a further defense defendants say that at the time said bail-bond required the appearance of Kahn before the Circuit Court of Lawrence county, to wit, on the first day of the September term, 1878, and during the whole of said term, Kahn was insane, and was confined in a lunatic asylum in the State of New York, beyond the jurisdiction of said court; that he had been thither carried and there confined under medical treatment for the cure of his said malady, and was by law and by the rules and regulations of said asylum restrained and imprisoned beyond the control or power of respondents as his sureties upon said bail bond, and beyond the control or power of said court or of the State of Arkansas. And respondents aver that there was not at the time aforesaid, nor is there now, within this State, any public or private lunatic asylum known to them, or other institution fit or suitable for the treatment, care, cure and safe-keeping of insane persons; and that said Kahn, being insane as aforesaid, was carried to the asylum aforesaid, in the State of New York, for the purpose of effecting a cure as aforesaid. and of preventing harm to the public, and still remains confined and imprisoned in said asylum, so that he could not come or be brought before said court in response to the requirements of said bond; and so respondents say they are not responsible upon or for the forfeiture thereof." The plaintiffs had judgment below.

Ross, for appellants.

Attorney-General Henderson, contra.

ENGLISH, C. J. [Omitting statement and a technical point.]

III. The third paragraph of the answer presents a novel defense.

It is a general principle of law that when the performance of the condition of a bond or recognizance has been rendered impossible by the act of God, or of the law, or of the obligee, the default is excused. Co. Lit. 206, *a*; Bacon Ab., tit. Conditions, *Q*. Where a man is bound for the appearance of W. N., *in banco*, if he die before the day the bond is saved. "There is a diversity," says Chief Justice BRIAN, "where a condition becomes impossible by act of God. as death, and where by a third person (or stranger), and where by the obligor and where by the obligee; the first and last are sufficient excuses of forfeiture, but the second is not, for in

such case the obligor has undertaken that he can rule and govern the stranger, and in the third case it is his own act. Vin. Ab., tit. Condition; *People v. Bartlett*, 3 Hill, 570.

This is like any other contract (says Bishop), performance of which is excused by the act of the law or of God, or by the public enemy, yet by no difficulties of an inferior kind. Imprisonment of the principal for crime therefore will generally release the bail, the State having taken him out of their possession; and so will the surrendering of him to the authorities of another State as a fugitive from justice. But if they permit him to go into another jurisdiction, and there he is arrested and imprisoned, they will not be released, for they should have kept him within his and their own State. 1 Bish. Crim. Proc., § 164 (i).

Belding v. State, 25 Ark. 315 ; s. c., 4 Am. Rep. 26, the only case cited by counsel for appellants to sustain the defense set up in the third paragraph of the answer, is not in point. There the principal in the recognizance was seized by the military authorities of the United States of this department, and imprisoned in Little Rock, and then sent to Vicksburg and imprisoned there, and so prevented, without the fault of the surety, from appearing in the Circuit Court of Hot Spring county, at the September term, 1867, to answer an indictment, as required by the condition of the recognizance; and this was held to be a valid defense for the surety. There the principal was not prevented from appearing by the act of the obligee in the recognizance (the State), but by a force claiming to act under authority of the Federal government, which neither the State nor the surety could control.

Bishop says the inability of the principal to perform the condition of the bond, produced by sickness to the degree which in law is deemed an impossibility proceeding from the act of God, will discharge the bail. 1 Bish. Crim. Pro., § 264, i, (3d ed).

To sustain the proposition thus formulated, he cites several cases, which we have examined.

In *People v. Tubbs*, 37 N. Y. 586, the defense was that when Tubbs, the principal, was called, and his sureties were required to produce him, he was sick and unable to go or be carried to the place where the court was held, and his non-appearance to answer the indictment for perjury was wholly without his fault or the fault of his bail. This was held to be a good defense, the failure of Tubbs to appear being classed as an act of God ; but it appears that Tubbs

Adler v. State.

was present, and offered as a witness for the sureties on the trial of the action on the forfeited bail bond, so that the State could not have suffered in the end by his failure to appear and answer the indictment at the term required by the bond.

In *State v. Edwards*, 4 Humph. 226, to a *scire facias* on a forfeited recognizance, the surety pleaded that the principal was sick during the whole term of the court at which he was bound to appear.

The court held the plea bad. "The fact," said Judge GREEN, delivering the opinion of the court, "that a defendant is sick, constitutes no reasons for his non-appearance in obedience to his recognizance, that will excuse the bail from a surrender of him at the subsequent term."

In *Alguire v. Commonwealth*, 3 B. Monr. 349, there was an attempt to excuse by the act of the State. The principal failed to appear in the Circuit Court of Kenton county, as required by the recognizance. The plea of the surety to the *scire facias* on the forfeiture was, that on the day the principal was required to appear, he was arrested for a felony in Louisville, and imprisoned there. The plea was held bad. The court said it was the duty of the surety to see that the principal was at Kenton Circuit Court, and not at Louisville, on the appearance day, when he was arrested at the latter place; and moreover, that the surety should have made known the arrest to the court at the appearance term, and obtained its process for the principal, and for respite of the recognizance, etc.

The paragraph of the answer in question does not allege that Kahn was sent to the New York asylum for care and medical treatment by any act or authority of the State. He was in the custody of appellants as his bail. The inference from the plea is, that they assumed the responsibility of sending him there, without consulting the court, or permitted others to do so. If by the law and regulations of the asylum he was detained there, as alleged, and out of the process of the court, it was not the fault of the State, but the result of their sending him there, or permitting him to be sent.

The matter of the paragraph was pleaded in discharge; if the State had taken issue to it, instead of demurring, and a jury had found the issue in favor of appellants, they would have claimed judgment on the verdict discharging them from the bail bond. And Kahn, though ever so sane, might never appear to answer the indictment.

It would be unsafe to the public to permit the bail of a person

Adler v. State.

charged with murder to take it upon themselves to send him out of the State, or permit him to be sent, to be treated for insanity, or any other disease, and then plead his absence in discharge of the bail bond.

Had the matter of the paragraph been addressed to the court, in the form of a motion, at the term at which Kahn should have appeared, if made satisfied of its truth, the court might, in the exercise of sound discretion, have continued the case, with leave to the bail to produce Kahn at a subsequent term. But by the plea for discharge, it appears, the matter was for the first time brought to the notice of the court; and the demurrer to it was rightly sustained.

[A minor matter omitted.]

Judgment affirmed.

NOTE BY THE REPORTER. — Compare *Wheeler v. Conn. M. L. Ins. Co.*, *post*.

In *People v. Bartlett*, 3 Hill, 570, it was held that it was a good defense to an action against sureties on a recognizance, that between the date of the recognizance and the term at which it was returnable, the principal was all the time in jail in another county in the same State, upon a criminal charge. The court said: "It is a general principle of law that where the performance of the condition of a bond or recognizance has been rendered impossible by the act of God, or of the law or of the obligee, the default is excused." This is put on the ground of an obstruction by the obligee. To the same effect, *Cooper v. State* 5 Tex. Ct. App. 215; s. c., 32 Am. Rep. 571; *Belding v. State*, 25 Ark. 315; s. c., 4 Am. Rep. 26. So in case of sickness of the principal at the day, followed by his death *People v. Manning*, 8 Cow. 297; *People v. Tubbs*, 37 N. Y. 586. In the latter case the court said: "The act of God or of the law will excuse the non-performance." So where before the return day, the principal voluntarily enlists in militia forces raised by the State under the president's call, and is thereby prevented from attending when called. *People v. Cook*, 30 How. Pr. 110. This is put on the ground of an act of the obligor.

But conviction and imprisonment of the principal in another State will not relieve the sureties. *State v. Horn*, 50 Mo. 466; s. c., 35 Am. Rep. 437; *Taintor v. Taylor*, 36 Conn. 242; s. c., 4 Am. Rep. 58; affirmed 16 Wall 366.

It has been held in some cases that imprisonment of the principal in another county of the same State will not relieve the sureties. *State v. Merrithew*, 47 Iowa, 112; s. c., 20 Am. Rep. 464; *Steelman v. Mattix*, 38 N. J. 247; s. c., 20 Am. Rep. 389. In the former, the case of *People v. Bartlett* was disapproved, as "not very thoroughly considered." But the case seems to have been put somewhat on statutory grounds.

This case is clearly distinguishable from the case of a principal arrested and imprisoned in another State. That is not the act of God nor of the obligee. But this is the act of God, with which the absence of the principal from the State has nothing to do. His failure to respond was caused by his insanity; not by his absence from the State.

CASES
IN THE
SUPREME COURT

117

GEORGIA.

WATTS v. SAVANNAH & OGEECHEE CANAL COMPANY.

(64 Ga. 88.)

Negligence — canal company — measure of diligence.

A canal company is not liable as a common carrier for timber lost from rafts transported by it, by theft, sinking, or otherwise.*

ACTION of damages. The opinion states the case. The defendant had judgment below.

J. R. Saussy, P. W. Meldrim, for plaintiff.

R. E. Lester, for defendant.

BLECKLEY, J. The declaration alleges that the defendant is a corporation of this State, having its principal place of business in the city of Savannah, and has damaged the plaintiffs two hundred dollars; that the defendant was and is engaged in the business of canalage, affording, by means of its canal, transportation from the river Ogeechee to the river Savannah, and to and from intermediate points, charging and receiving certain tolls; that it has attached to and connected with its canal certain ponds used as booms, for the safe-keeping

*To same effect, *Penn. Canal Co. v. Bunt* (90 Penn. St. 281), 35 Am. Rep. 659.

Watts v. Savannah and Ogeechee Canal Company.

and custody of such timber as may be delivered to it, charging and receiving compensation for the boorage or safe-keeping ; that the plaintiffs in the year 1876, on divers days (specifying them) delivered to it certain described timber of the value of \$106.37, for safe-keeping in said booms ; that by reason of the carelessness and negligence of the defendant, its agents and servants, said timber has been wholly lost to the plaintiffs ; and that "the said defendant, though often requested, has refused and still doth refuse to deliver to your petitioners the said timber or any part thereof, or to pay the value thereof ;" wherefore process is prayed, etc. The defendant pleaded not guilty, and *ultra vires*.

At the trial, the court, on motion of the defendant, ordered a nonsuit, holding the plaintiffs' evidence insufficient to make a *prima facie* case for recovery. Whether or not this adjudication was erroneous, is the question made by the writ of error.

One of the plaintiffs testified to the description, ownership and value of the timber lost. It constituted a part of three rafts brought to Savannah over the defendant's canal, one of which was left in the canal and the other two were placed in the basins. No arrangement for care and custody was made between the parties. The defendant has nothing to do with the transportation of timber over the canal, except to keep the canal and locks open, the care and custody during transportation being in the owners. The receipt is given by the defendant. Its custom is to allow the timber to remain fifteen days without charge, and after that time to charge for dockage at the rate per month of twenty cents the M feet. Timber, after inspection, is allowed to remain in the canal or may be placed in the basins or artificial harbor, from which it is taken by owners as required, they, by their servants, or the servants of their factors, moving the timber from the basins to and through the locks, and the lock-keeper suffering it to pass on orders which are sent to him by such owners or their factors. Sometimes a whole section is taken out at once, and again only a few pieces. The lock keeper enters in a book which he keeps, an account of all timber that passes the locks. The timber in the rafts, of which the sticks now sued for formed a part, became loose, and the witness had it brought together and staked, and the president of the canal company allowed him twelve dollars for expenses incurred in so doing. The rafts remained in the canal basins until after the yellow fever of 1876, and dockage at the usual rate was paid to the com-

Watts v. Savannah and Ogeechee Canal Company.

pany upon all except the lost timber. When the rafts were sold and ordered out, seven sticks could not be found. The witness does not know what became of them. The president of the company promised to settle for them, but never did so. The price charged at other booms is fifteen to twenty cents the M. feet per month and they too do not receipt for timber.

A clerk of the plaintiffs testified that the basins are from 150 to 300 yards from the lock-house where the lock-keeper resides. Upon the arrival of timber near the lower lock, it is regularly inspected by sworn inspectors, who give the lock-keeper the name of the owner, number of pieces, and the dimensions, and he makes entries accordingly in his book; it is by this means that he knows what to charge and from whom to collect. Timber is put in the basins, sometimes by the owners, sometimes by the canal company. No receipt is required or given. An order is given to the lock-keeper to pass through the locks and the timber is so passed per order. One of the three rafts of the plaintiffs was put in the basin by the defendant. The witness saw all the timber a few months before the seven sticks were lost, and it was in good condition. When witness went for it, the lock-keeper admitted that it was short seven pieces according to the entries in his books, and he assisted witness two days in searching for the missing pieces. Timber, as loblolly, fat or rotten, will sink, but none of this was of such character, and none of it was found in a sunken condition.

Another person, a timber dealer, and familiar with the trade, testified that an account of the timber brought down the canal is given by the inspectors to the lock-keeper. The defendant has control over the location of timber placed in the basins, and the lock-keeper can place it where he pleases. It is usually inspected in the basins, and is cut loose so as to be turned over, and then fastened by pinning the outside sticks, but not securely. The dockage or boomage has been charged and received by the defendant for years on timber remaining over fifteen days in the canal or the basins. The price is about the same as at the river booms. These latter charge 15 to 20 cents per M feet per month. At them there is tide-water, and a watchman is employed, and the timber is secured, but in the canal basins there is no tide-water; the banks prevent the timber from getting away or being stolen. It could not be removed except through the locks. There is no watchman at the canal basins—the lock-keeper is about 150 yards from them.

Watts v. Savannah and Ogeechee Canal Company.

Witness has known timber passed through the locks by mistake. that is, the timber of one party was allowed to pass as the timber of another; such taking was by the servants of the factor who had the sale of the timber. The canal company has nothing to do with the custody or control of timber while it is being transported over the canal.

Did this evidence make a case? We think not. According to the charter of the canal company (Dawson's Comp. 90 *et seq.*, and amendments thereto, acts of 1831, p. 200; of 1837, p. 214; of 1847, p. 141; of 1849-50, p. 208), the business of the corporation is to maintain and keep open a water-way for the use of the public, taking tolls for such use. In the light of the charter and of the evidence the company is not a carrier; it is not engaged in the business of transportation; it furnishes nothing but the water upon which the commerce of the canal floats; its servants render no assistance in the actual work of navigation, and it assumes no custody or control of the property which enters the canal and passes over or through it. The basins at the Savannah terminus are but expansions of the canal proper, and are evidently intended for the more ample accommodation of customers, since all have a right to their use free of any charge additional to the ordinary tolls for fifteen days, and this indulgence is equally applicable whether the timber lies in the basins or in other parts of the canal. The regulation which subjects customers to a further assessment under the name of boomage or dockage, in case they fail to withdraw their property within fifteen days after the transportation is completed, has for its object most probably the clearing away of the commerce which has arrived at destination, to make room for subsequent arrivals, so as to keep the canal from choking up. Without something to stimulate discharge, those customers who have been served might render it impracticable to serve with reasonable expedition and equal advantage those who are behind them. In order to keep the canal open alike to the whole public, that portion who bring their rafts into port early must get out of the way of that portion who come later; and there can be no doubt that to give each individual the half of a month, or the twenty-fourth part of a whole year, to move out, is a very liberal allowance of time. To furnish mere water-surface and support during a longer period, on condition that it is paid for at an established rate per month, does not impress upon the canal the character of a water

Watts v. Savannah and Ogeechee Canal Company.

warehouse, or make the company a bailee for storage and safe-keeping. The business of the company is exclusively that of road-making and road-mending, and in the absence of special contract, it owes no duty to customers beyond that of keeping the canal and basins in good order, and open for use. Whether the property afloat is, for the time, stationary in suitable situations, or in motion along the main channel, makes no difference; the legal relation of the company to it is the same in the one case as in the other. The manning of rafts which are moored, or the keeping of watch over the same, is neither more nor less in the line of the company's business than is the like service in respect to those which are making the voyage; and no new duty arises toward such as have become subject to charges on account of continuing to occupy space in the canal or its basins for a longer term than fifteen days after reaching port. The true nature of this further assessment is a graduated toll upon lingering rafts, proportioned to the length of time they respectively enjoy the use of the company's water-way, and somewhat to the extent of water-surface they occupy. For any wrongful act of the company to the commerce of the canal, the company would be liable in damages, whether the property lost or injured was, at the time, in transit or at destination; but the mere disappearance of property from the canal or the basins, unaccounted for, is not evidence of any such act. In the present case, the missing sticks of timber might have sunk, or they might have been stolen and carried away. How they disappeared, or what became of them, is simply an unsolved mystery. One of the witnesses had known instances in which the lock-keeper had by mistake, suffered timber to pass through the lock, but he did not pretend that he had any knowledge that this particular timber passed out that way. If mistake in the other instances could be detected, no reason appears why it could not also be detected in this, if it had occurred; and to argue from known mistakes that an unknown one has taken place, not simply that it might have taking place, is unsound. There was no evidence that mistakes were habitual with the lock-keeper, or committed with a frequency more than ordinary, or that he was unfit for his position, or below the average in competency. There is no wrongful act of commission or omission on the part of the company even pointed to by the evidence, much less established, in regard to this particular timber. The timber disappeared, was searched for thoroughly and could not be found; the president of the company

promised to pay for it, and failed to comply with the promise; these are the facts which bear against the company with most force, and they wholly fail to support the declaration. It would be altogether unwarranted to infer liability from the president's promise to pay, as the circumstances did not justify the promise, and as the president himself seems to have reconsidered it, and declined compliance. The company is not shown to have failed to perform its charter obligations, or to have done any wrongful act, and hence the nonsuit was properly awarded.

Judgment affirmed.

O'CONNOR V. STATE.

(64 Ga. 125.)

Criminal law — homicide — by police officer in unlawful arrest.

Where a police officer, without warrant, and for an alleged offense not committed in his presence, arrested an innocent man, and in trying to prevent his escape, killed him, this was at least manslaughter.

CONVICTION of manslaughter. The opinion states the case.

C. J. Harris, Hill & Harris, A. O. Bacon, for plaintiff in error.

C. L. Bartlett, solicitor-general, and *Samuel Hall*, for the State.

WARNER, C. J. The defendant was indicted for the offense of murder, and on his trial therefor was found guilty of involuntary manslaughter in the commission of an unlawful act. A motion was made for a new trial on the various grounds contained therein, which was overruled, and the defendant excepted.

1. 2. It appears from the evidence in the record, that the defendant was a policeman in the city of Macon, and that he arrested the deceased and was taking him to the barracks in said city, that the deceased attempted to escape from him, when defendant struck him on the head with the club, from which blow he died that same day, in the barracks, where he was confined. There is no evidence in the record that the deceased had committed any offense against the State or the ordinance of the city, nor is there any evidence

that any person had lodged any complaint against the deceased for having violated any law of the State or city and notified the defendant thereof, or that the deceased had committed or attempted to commit any violation of the law in the presence of the defendant at the time he arrested him. It is true that the defendant, in his statement to the jury, not under oath, says that he had heard that the deceased had on the day before the arrest, offered to sell a pair of shoes found in his possession to Mrs. Noon, and at the time of his arrest was trying to sell the shoes to Molly Raoul. There was no evidence that the shoes had been stolen from any person, but on the contrary, it was found that the deceased was a shoemaker, and that the shoes had been left with him by Fanny Cooper, the owner of them, to be stretched, and that deceased was to bring them to her the morning he was arrested with them in his possession. The defendant did not offer to prove by Mrs. Noon, or by Molly Raoul, the truth of his statement in regard to the deceased offering to sell the shoes to them, or either of them, even if that would have authorized him to have made the arrest of the deceased. An officer may make an arrest without a warrant for a crime committed in his presence, or if the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant. Code, § 4723. But there must be an offense committed by the party arrested. In the case under review there was no offense committed by the deceased to have authorized his arrest by the defendant. We have carefully examined the various grounds of error assigned to the rulings of the court during the progress of the trial, as well as to the charge of the court to the jury, and we find no error in overruling the motion for a new trial. In our judgment the law and the facts in the case required at least the verdict which the jury have rendered.

[Unimportant point omitted.]

Let the judgment of the court below be affirmed.

Judgment affirmed.

Davis v. Mayor and Council of Macon.

DAVIS V. MAYOR AND COUNCIL OF MACON.

(64 Ga. 128.)

Municipal corporation — license tax — selling butchers' meat — "agricultural products" — "peddler."

A city authorized to tax all persons exercising within its bounds any profession, trade or calling, may impose a license tax upon persons selling butchers' meat therein, "whether from stalls or shops or by peddling," and upon their wagons used in that business, although "agricultural products" thus sold are exempt, and although such persons reside and have their slaughter-houses and sale shops out of the city, and come into the city simply to deliver to customers, and although farmers selling their own products are exempt, and although such wagons are otherwise taxed as property.*

INJUNCTION to restrain collection of tax. The opinion states the case. The injunction was denied below.

John L. Hardeman, for plaintiff in error.

W. B. Hill, for defendants.

BLECKLEY, J. In July, 1879, the city corporation of Macon issued a *fi. fa.* against H. G. Davis & Co. for \$50, "it being license city tax for retailing fresh and butcher's meats in the city, and peddling the same on the streets, for the year 1879." Also a *fi. fa.* for \$25, "it being license city tax for running a one-horse wagon for the year 1879." Both these *fi. fa.* were levied by the city marshal upon certain personal property of Davis & Co. An ordinance of the city, passed June 12, 1879, declared that the various amounts specified therein should be levied and collected as license and business taxes for the year 1879. Among the numerous specifications in the ordinance were the following: "Each person or firm (farmers selling their own produce excepted) retailing fresh or butcher's meat in the city, whether from stalls, stores or by peddling the same on the streets, shall pay a license of \$50. * * * "For each and every wagon used by butchers and bakers in their business, and wagons used by brewers and manufacturers of soda water, or

* See *Ward v. Mayor and Aldermen of Greenville* (8 Baxt. 228), 35 Am. Rep. 700, and note, 702.

Davis v. Mayor and Council of Macon.

for the delivery of oil, milk or any other article (except wagons delivering milk from dairies on country farms), and package delivery wagons, where such wagons are used for hauling in the city, and drawn by one horse, shall pay \$25."

By charter the city of Macon has power to tax property, real and personal, within the city, at a rate not exceeding (for all purposes) one and a half per cent *ad valorem*, and also "power to levy and collect a tax upon * * * all persons exercising within the city any profession, trade or calling, or business of any nature whatever." Acts of 1871-2, pp. 120, 121. The Constitution of 1877 (art 7, § 2) declares "all taxation shall be uniform upon the same class of subjects, and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws. * * * The general assembly may by law exempt from taxation (certain specified property). No poll tax shall be levied except for educational purposes, and such tax shall not exceed one dollar annually upon each poll, All laws exempting property from taxation, other than the property herein enumerated, shall be void." The Code, in § 1605, provides that "No municipal corporation of this State shall levy or assess a tax on cotton or the sales thereof, nor shall any such corporation levy or assess a tax on any agricultural products raised in this State, or the sales thereof (other than cotton), until after the expiration of three months from the time of their introduction into said corporations."

On the first of August, 1879, H. G. Davis & Co. filed their bill against the corporation of Macon, praying for an injunction against the collection of the two executions above described, and that said corporation and its officers be restrained from proceeding further at law touching the matters in question. At the hearing of the order to show cause the injunction was refused, and that is the alleged error.

The charges of the bill make the following case: The complainants do not reside within the corporate limits of the city; they carry on the business of butchers, but have no slaughter-pen, stall or place of business within the city; their slaughter-pen is about one mile outside of the city limits, and their shop is in Vineville; a few of their regular city customers reside in the city of Macon, and the complainants deliver to these at their doors fresh meats, using for this purpose a one-horse wagon, which

wagon is the property of complainants; that for such delivery they charge nothing, nor are they paid any thing; that they do not retail fresh or butcher's meat in the city from a stall or store, nor peddle the same upon the streets; and that the cattle they slaughter are raised in Georgia, not bought in the city, but bought from farmers in Bibb and adjacent counties, brought to the complainants' pens outside of the city limits, and there slaughtered, and the interval between the purchase of the cattle and the sale of the meats is never longer than two weeks; and that the city has no public market. The bill proceeds to allege that the executions were issued and levied; complains that the levies were excessive, etc., and then attacks the validity of the ordinance for the following reasons: That the tax is not uniform upon the class taxed; that the city has no authority to license delivery wagons of non-residents used for their own purposes; that the city has no authority to tax agricultural products raised in Georgia, or the sale thereof, until after the expiration of three months from their introduction into the city; that by exempting farmers selling their own produce, the ordinance fails in uniformity; that complainants have paid all State and county taxes due on their property; that the city does the greater part of the work on the streets with the Bibb county chain-gang, to the support of which the city does not contribute. The bill also makes the point that the complainants are not within the provisions of the ordinance, because they are non-residents of the city, have no place of business within it, and do not retail meats within it from stalls or stores, or by peddling on the streets.

1. The power of the city to impose the so-called license tax is denied. But the authority to levy and collect a tax upon all persons exercising within the city any profession, trade or calling or business of any nature whatever, is expressly granted by the charter. This power is surely broad enough to reach the complainants if they carry on, within the city, the business of retailing fresh or butcher's meat. Why not? *Lanier v. Mayor*, 59 Ga. 188; *Mayor of Macon v. Savings Bank*, 60 id. 133.

The ordinance is further attacked as invalid because it has an exception in it exempting from its operation farmers selling their own produce. The exception would probably have been implied had it not been expressed, for the tax imposed is a business tax, a tax on avocation or calling. The business of a farmer is production,

Davis v. Mayor and Council of Macon.

not trade, and the sale directly by himself of what he rears or produces is merely occasional or incidental. No doubt very considerable restrictions might be imposed upon farmers as to the manner of conducting their trade; but while the public authority can restrict them in that respect, it is not obliged to do so as a condition of taxing other persons on their business or avocations. We need not and will not say that for the purpose of upholding a general meat-market, or a system of meat-markets, in a city, farmers could not be prohibited from retailing or peddling meat of their own raising within certain hours, and perhaps they could be confined to certain localities within the corporate limits. We have not thought it necessary to advert to authority on such questions as these, or even to address our minds to them with any earnestness, for it is manifest that construing the ordinance in the light of the charter, the tax with which we are dealing is a business tax; and the disposition of meat as the immediate sequel to rearing animals upon a farm is obviously no separate calling from that of farming. It is but the primary link of connection between the producer and the consumer—a link fastened to the farmer's vocation, and with which the commercial chain begins if other links are added before consumer is reached, and which constitutes the entire process where consumption is by the first purchaser. The constitutional requirement that "all taxation shall be uniform upon the same class of subjects," is not infringed by the ordinance in the provision which we are considering. The producer whose trade is incident to production, and the middle-man whose trade is intermediary between the producer and the consumer, belong not to the same class, but to different classes of subjects in a scheme of taxation. At least, the difference is wide enough to justify, if not to compel, its recognition in shaping the scheme.

2. The tax of the complainants upon the wagon which they use in their business is attacked because the ordinance exempts wagons used in delivering milk from dairies on country farms; this discrimination also is urged as breaking up the uniformity which the Constitution requires as to the same subjects of taxation. It is manifest that this wagon tax is a part of the business tax, and nothing can be plainer than that the delivery of milk from a farm-dairy is a different business from that of retailing butcher's or fresh meat. In adjusting a business tax, those who are engaged in the same business are to be taxed alike; but there is nothing in the Con-

Davis v. Mayor and Council of Macon.

stitution to prevent the different occupations and their instrumentalities from being taxed unequally, nor to prevent the taxation of one class of business and the exemption of another. 60 Ga. 597.

3: It is insisted further that by the tax upon the wagon, the *ad valorem* principle of the Constitution is violated. This objection proceeds upon the theory that the wagon is mere property, and subject only to State and county taxes, the owners not residing within the corporate limits of Macon, which taxes have been duly assessed and paid. The complainants contend that having paid all taxes on the value of the wagon as property with which they are chargeable, they cannot be required to pay an additional specific tax to the city upon the same property. But as already stated, the tax now in question is not a property tax, but a business tax; the wagon is treated as an instrument used in carrying on the business of the complainants within the city, and it has been ruled, and no doubt rightly ruled, that the number and kind of vehicles may be regarded in measuring a tax of this description. *Johnston v. Mayor*, 62 Ga. 645. That the complainants are in no default to the State and county in respect to taxes upon the value of the wagon as property, is no protection to them against the business tax now demanded. *Frommer v. Richmond*, 31 Gratt. 646; s. c., 31 Am. Rep. 746. The suggestion in the bill that the streets of the city are not kept in repair at municipal expense, but by the labor of the county convicts, needs no discussion; for it does not appear that the city has been absolved from the legal obligation of keeping its streets in order. By what means, as matter of fact, the obligation is complied with for the present, seems quite immaterial. That the complainants do not burden their customers with any charge for deliveries, cannot affect the question of taxation.

4. The next point relates to the effect of section 1605 of the Code upon both of the assessments we are considering. That section inhibits taxation by any municipal corporation on agricultural products raised in this State, or on the sales thereof, until after the expiration of three months from their introduction into the corporation. If fresh or butcher's meat can be classed as an agricultural product, without something in the context of the statute to show that the phrase, agricultural products, was in this particular instance used in a sense animal as well as in a sense vegetable, there ought to be evidence that the meat in question was produced in the pursuit or by the fruits of agriculture. Cattle, so far as we know, may be Georgia-

Davis v. Mayor and Council of Macon

raised and belong to farmers, and yet never have consumed a pound of food derived from agriculture. In the middle and lower parts of the State, herdsmen or stock-raisers are perhaps indebted to natural pasturage alone for the subsistence and growth of the animals which they rear, and which afterward find their way to market. We are not informed by the record that the agricultural industry of the State produced, or contributed to the production of the meats in which the complainants dealt. The cattle were bought from farmers, but there is no express allegations that they were "agricultural products." And when it is thought of closely, would it not be rather an unusual application of the phrase "agricultural products" to make it comprehend beef cattle? In ordinary usage, is not that phrase confined to the yield of the soil, as corn, wheat, rye, oats, hay, etc., in its primary form? When there has been conversion of the fruits of the soil into animal tissues, are we still to apply the phrase? And suppose we are to disregard the change in its first stage, and call a cow or a steer agricultural product, must we carry the name forward to the steak or roast which the butcher sells us from the slaughtered animal? If cattle fall under the denomination, so do hogs, and if beef, so does bacon. Passing from this verbal difficulty and turning to an argument of altogether another class, it is to be noted that the tax we are considering is not laid upon the beef sold, nor upon the sale thereof, nor is the amount of the tax measured by the amount of sales. The tax is upon business and upon the vehicle used therein, and to conduct such business by such means has no necessary relation to "agricultural products raised in this State," granting that fresh beef is to be classed as an agricultural product. It would be possible to conduct a like business by like means with beef raised elsewhere, and if the complainants chose to deal in Georgia-raised beef as a business are they to be therefore exempted from all business tax? Is a merchant or factor to pay no business tax because he sells Georgia produce rather than Alabama or Tennessee produce? And is the taxability or non-taxability of a butcher to depend upon the State in which the animals he slaughters happened to be reared? Granting that the discrimination could be made (and that it could is by no means certain), must it be made? We rather think not. Could a lawyer escape a professional tax by confining his practice to cases in which non-taxable property, such as that used for worship or

Davis v. Mayor and Council of Macon.

burial, public charity, colleges, incorporated academies, etc., was involved or in controversy? It would be strange if he could.

5. The ordinance being good, are the complainants within it? Their residence, their shop and their slaughter-pen are all out of the city limits. They purchase and slaughter outside, and have no place of business inside, but they habitually haul inside a part of their fresh meat, and from their wagon deliver to regular customers at the doors of the latter within the city; they make no charge for the delivery, but it is evident that they distribute the meat from their wagon in retail parcels. Where they cut and weigh to suit parcels to the demand of customers does not appear. We are to suppose they do it in the wagon, as they do not aver to the contrary. The pleadings and evidence are equally silent as to where orders are taken, and where payments are made, and whether made on each and every delivery, or by the week, month or year. There is no suggestion that the meat is not paid for, though the hauling is free. We cannot see but that the wagon is made a kind of portable shop, and moved daily to the door of each customer. Although the complainants allege that they do not peddle meats, they seem to rest the allegation on the fact that they confine their dealings to regular customers; but where a dealer supplies constantly recurring wants he may be a peddler, however regular and uniform the demand may be for his wares. There is a striking degree of regularity in the patronage of almost every business. When I was a solicitor-general, nothing in my experience struck me with more force than that, term after term, in each county of my circuit, I met substantially the same body of people who had connection with the criminal docket—the same array of prosecutors, defendants and witnesses. Here and there a new man would come in, and occasionally a prosecutor would become a prosecuted, and *vice versa*, and the witness class would sometimes disintegrate and mix up with the other two; but my intimates were, and continued to be for four years, very much the same individuals. They were my regular customers. It is not improbable that every peddler who follows the road has his regular customers, and that the regularity with which they buy induces him to return again and again to the same neighborhood, unless he has nomadic tastes which solicit him to disregard all routine. The complainants vouchsafe to us no explanation of their method of dealing with their customers, save that they deliver at their doors and make no

Lee v. State.

charge for delivery. Making, as we are bound to do, every reasonable presumption against them where they might explain and do not, we hold that they are within the ordinance, both as to the license tax and the specific tax upon the wagon, and that the ordinance is no less obligatory upon them than upon the residents of the city who retail fresh or butcher's meat therein, and use a wagon or wagons for making delivery to customers.

Judgment affirmed.

LEE V. STATE.

(64 Ga. 208.)

Criminal law — larceny — bringing stolen goods into State.

Where one stole a horse in Tennessee, and drove it across the boundary into a border county of Georgia, and from place to place in that county, *held*, that he was not guilty of larceny in Georgia.*

CONVICTION of larceny. The opinion states the case.

W. C. Glenn, Johnson & McCamy, for plaintiff in error.

A. T. Hackett, solicitor-general, for State.

BLECKLEY, J. The accused stole a horse in the State of Tennessee. He brought the animal into this State, and here carried it from place to place in the border county of Whitfield. In that county he was indicted for the offense of simple larceny, and being convicted, moved for a new trial, which was refused.

Whether he was guilty or not, depends upon whether a fresh larceny was committed here. The doctrine that a larceny is repeated in every county of the same sovereignty in which any asportation of the stolen goods occurs, is established; and to that extent the fiction is to be accepted in place of the original fact. Fiction ought to have no place in the law, and it is to be hoped that the time will come when it will be rooted out; but in so far as it has been incorporated into the law, it must, for the present, be treated as of equal potency with reality. We have adopted the common

* See *Com. v. White* (128 Mass. 430), 25 Am. Rep. 116.

 McCauley v. Gordon.

law of England, and with it the theory of *repetition larceny*, but in that country this theory would not embrace the present case; and that it would not there embrace it is a very sufficient reason for holding that it does not embrace it here. Ros. Cr. Ev. 646; 2 Russ. on Crimes, 119; 4 Bac. Abr. (Bouv. ed.), 179. In this country the decisions are conflicting. See Whart. Cr. Law; Whart. Cr. Ev.; Bish. Cr. Law; Rorer on Inter-State Law. We think the soundest decisions are those which least favor the doctrine of constructive crimes. The true legal relation of the accused to our State, is that of a fugitive from justice from the State of Tennessee.

Judgment reversed.

McCAULEY V. GORDON.

(64 Ga. 231.)

Negotiable instrument — alteration — partnership — indorsement,

A partnership purchased goods, and one of the partners delivered in payment a note of third parties payable to the order of another of the partners, and indorsed by the partner so delivering it, in the name of the payee, but without his knowledge or consent. Subsequently the words "or bearer" were inserted in the note without the knowledge or consent of the makers. *Held*, that the makers were not liable.

ACTION on a promissory note. The head note and opinion state the case sufficiently. The plaintiff had judgment below.

W. K. Moore, for plaintiffs in error.

Johnson & McCamy, for defendants.

BLECKLEY, J. There can be no doubt that to tamper with a promissory note so far as to insert in it the words "or bearer," is grossly improper. It verges on forgery. The introduction of such words is a material alteration, for they go to modify the manner of negotiating the instrument. *Scott v. Walker*, Dudley, 243. Without them, or words of similar import, the instrument is negotiable by indorsement only; with them, it is negotiable by bare delivery as well as by indorsement. It is said they were immaterial in the present case for the reason that the note was indorsed in blank before their insertion, and thereby the note had already become negotiable by delivery, the effect

McCauley v. Gordon.

of indorsement in blank being to render it payable to any bearer. But the payee did not indorse, and the person who did indorse, though a partner of the payee, did not indorse in the partnership name or in his own name, but in the name of the payee; and this he did without any authority further than the general implied authority of the partnership relation. The partnership had an established partnership name, which was quite different from the name of the individual partner to whom the note was payable. The agency of a partner to sign for the partnership is generally restricted to signing in the established partnership name, where the partnership has such a name. Let it be conceded that the note was partnership property, and that the partner who transferred it had a right to transfer it, we think that without some special authority from the payee, he could not indorse it in the name of the latter, and put it afloat with all the incident of negotiable paper transferred before due; and if he could not do this, the words "or bearer," had they been genuine, would or might have varied the rights of the holder, and made these rights more comprehensive; and whatever would or might have had that effect cannot be treated as immaterial. There is a public policy to be subserved in guarding the purity and integrity of negotiable paper, and neither surreptitious interpolations in the body of the instrument, nor the indorsement by one man with the name of another, ought to be countenanced as a strictly commercial transaction in a doubtful case. On the face of the note is nothing to indicate the connection of any partnership with it; and the operation of the indorsement in the name of the payee would be *prima facie* to render him, and him alone, liable upon the contract of indorsement. All interest of the partnership in the transaction depends upon evidence extrinsic of the note and of the indorsement, and this being so, the words "or bearer" have a material bearing upon the measure of evidence requisite to make a case for recovery by the holder against even the makers. As the note was not in fact indorsed by the payee, it is easy to see that the holder would be better off with the words "or bearer" in the terms of the instrument than if they were not there, since the want of them would place upon him the burden of proving that the indorsement was made with the payee's authority, the plea putting the genuineness of the indorsement in issue. In any and every view of the matter, the alteration was material, and the court erred in the instructions given to the jury.

Judgment reversed.

BRACKEN V. DILLON.

(84 Ga. 243.)

Evidence — merchant's account books

Shop books are secondary evidence, only admissible upon proof that the persons selling the goods are inaccessible. They will not establish large items of cash, nor accounts of third person transferred to defendants, without proof of the authority for the transfer.

ACTION on account. The opinion states the facts. The plaintiff had judgment below.

S. W. Hitch, Symmes & Atkinson and Ira E. Smith, for plaintiffs in error.

Goodyear & Harris, for defendants.

JACKSON, J. This suit was brought on an open account by the plaintiffs against the defendants as partners. These partners were successors to Bracken, one of those now sued, and Bracken was successor to Bracken & Haslam. On the account sued on were items transferred from Bracken's account when alone and from Bracken & Haslam's account. Under the rulings and charge of the court, the jury found some eight or nine hundred dollars with interest for several years against the defendants, Bracken & Ellsworth, successors as aforesaid, and they moved for a new trial, which the court refused, and this refusal, on many grounds taken in the motion, is the error assigned.

1. It is claimed that the books were improperly admitted on behalf of the plaintiffs to prove any thing at all. There were two clerks alive, and not inaccessible so far as was shown in the proof, who were the salesmen of the goods sold and delivered. Besides, there appear to have been two book-keepers, one of whom was dead, but the other accessible, being the son of the plaintiff who was sworn in the case. The question is whether these books of goods so sold, and the books so kept, were admissible in evidence, even to prove the account for the groceries and provisions sold by the plaintiffs in the line of their ordinary business.

Our law on this subject is plainly and fully presented in the Code, (section 3777) and is as follows:

Bracken v. Dillon.

“The books of account of any merchant, shop-keeper, physician, blacksmith, or other person doing a regular business and keeping daily entries thereof, may be admitted in evidence as proof of such accounts, upon the following conditions:

“1. That he kept no clerk, or else the clerk is dead, or otherwise inaccessible.

“2. Upon proof (the party's oath being sufficient) that the book tendered is his book of original entries.

“3. Upon proof (by his customers) that he usually kept correct books.

“4. Upon inspection by the court to see if the books are free from any suspicion of fraud.”

This codification of the Georgia law upon this subject embodies the substance of the adjudications of this court from 1st Kelly to this day. *Taylor v. Tucker*, 1 Kelly, 233; *Hall v. Carey*, 5 Ga. 239; *Bower v. Smith*, 8 id. 74; *Fielder v. Collier*, 13 id. 496; *Day v. Crawford*, id. 508; *Creamer v. Shannon*, 17 id. 65; *Banks v. Darden*, 18 id. 318; *Keaton v. Davis*, id. 457; *Leary v. Leary*, id. 698; *Slade v. Nelson*, 20 id. 365; *Merchants' Bank v. Taylor*, 21 id. 334; *Bailey v. Barnelly*, 23 id. 582; *Ganahl v. Shore*, 24 id. 17; *McDaniel v. Truluck*, 27 id. 366; *Cloud v. Hartridge*, 28 id. 272; *Bigelow v. Young*, 30 id. 121, 904; *Chastain v. Brown*, 31 id. 346; *Crawford v. Stetson*, 51 id. 121; *Petit v. Teal*, id. 57; id. 145; *Reviere v. Powell*, 61 id. 30.

Nor does our law differ much — not at all except in some details — from the laws of the other States and indeed, of most of the civilized world, including the mother country. See 2 Phill. on Ev., note 491, p. 682 *et seq.*, and cases there cited, where the whole subject is discussed, and very similar conclusions to those summarized in our Code are reached.

From this summary, which is our law by our own statute embodied in our Code, whether supported or not by other authority (though it is so supported), it would seem clear that the evidence of books is secondary, and introduced only when no other evidence can be got — *ex necessitate rei*.

Therefore if the sale-clerks of the party who offers the books be alive and accessible, he cannot prove even an ordinary account by the books; because he has better evidence in the clerks who sold and delivered the goods. Moreover, if he had a book-keeper accessible, that book-keeper, not himself, must prove that the books are

the books of original entry ; because that book-keeper is a clerk, and his absence must be accounted for, his evidence being the test of the entries which he, the clerk or book-keeper, made.

From an examination of the evidence in the record, it appears that the clerks who sold the goods were both alive and not inaccessible — at least there was no proof of death or of their being beyond seas — or otherwise out of reach of process of the court. There appear also to have been two book-keepers, one was proven to be dead, but the other was not accounted for, yet the party was permitted to prove the books to be those of original entries, contrary to the ruling in 13 Ga. 508, and when he himself appears not to have made a single entry therein. The evidence of the two salesmen was the best, 18 Ga. 693 ; 20 id. 365, and in their absence, to admit the books, all the book-keepers who made the entries should have been sworn or accounted for, before the party himself could be sworn to the books — so as to admit them. Moreover, there appears to have been admitted in evidence, as well as we can ascertain from a confused record, not only the journal, but the ledger. The latter should not have been admitted, at any rate only to show a regular system of book-keeping, but in no event to prove the account or any part of it. To prove that, the book of original entries, the entries made, as a practice, daily, are alone proof or evidence. Mere temporary memorandum books, used by the salesmen, and transferred nightly from pencil entries of theirs to the permanent ink book of the daily sales, are not the books of original entries, so as to exclude such permanent book ; but the latter is the book contemplated by the statute.

2. But most assuredly these books were not proof of the legality of the transfer of the individual accounts of Bracken to the account of Bracken & Ellsworth.

The charge of the court seems so to regard them, and the judge nowhere called the attention of the jury to those items as not included in the proof which the books were competent to make, if competent at all. His entire charge is not in the record ; but the extracts from it show no such exception. So in regard to cash payment of drafts, etc., which the books could not establish as due by the defendants to the plaintiffs. See 8 Ga. 74 ; 57 id. 145 ; Code, § 3777.

3. To bind Ellsworth, who came into partnership after debts were due by his predecessors, Bracken, and Bracken & Haslam, for those

Bracken v. Dillon.

debts so incurred by his predecessors, it was incumbent on plaintiffs to show some express agreement, or some agreement implied by his individual conduct, to assume that indebtedness. Some authority from him to transfer the old accounts or other indebtedness of the old firm, or prior parties, to the new firm of which he became a member, is essential. "A new partner is of course liable for all the subsequent debts of the firm, in the same manner as any other partner, and it is equally obvious that he is not liable for the old debts, unless he assumes them for a consideration." Pars. on Part. 433. The author, Parsons, then goes on to discuss the consideration necessary to support the promise, and closes with this remark: "On the whole, we should say that the law of contracts and the law of partnership lead to the conclusion that the new partner is not bound to the old creditors, unless on a promise to them for a consideration, both of which might of course be indirect and implied by circumstances." And then the circumstances are indicated, such as paying interest on the old debt, or the knowledge without objection that the firm, of which he is a member, paid the interest. See, also, notes and cases cited. Pars. on. Part. 433-6.

On the whole, we think that the question in this case on this point was not submitted clearly and fully to the jury. It is, as appears from Parsons, above cited, a question mixed of law and fact for court and jury, and we think that the court should have charged that Ellsworth could not be held liable for these debts of the old firms unless he had assumed them, and that the jury must be satisfied from the evidence that he did assume them as a member of the new firm; that he authorized the transfer and considered the debt that of the new firm, of which he was a member; that this agreement could be established by circumstances as well as direct proof, such as payments made on the old accounts by the new firm, with his knowledge and consent, or other equivalent circumstances, if any, but always such as to bring home knowledge of what was being done to him.

[Omitting minor points.]

Judgment reversed.

Curry v. Mayor and Aldermen of Savannah.

CURRY V. MAYOR AND ALDERMEN OF SAVANNAH.

(64 Ga. 290.)

Municipal corporation — public property — execution.

A house and lot owned by a city, formerly used by them for a fire engine, and still held for the like future use, is exempt from execution.

THE opinion states the point. The defendant had judgment below.

W. W. Montgomery, for plaintiff in error.

W. D. Harden, for defendant.

JACKSON, J. The sole question is, whether a certain lot and tenement formerly in use for a fire engine by the city authorities, and still held by them for future use in like manner and purpose, is liable to be levied upon and sold by the sheriff under a *fi. fa.* issued upon a common-law judgment.

We think that all property held by the city authorities for the public use, health or enjoyment of the people of the city, is not so liable to levy and sale. Further, we are of the opinion that all property of every kind held by the municipality is presumptively for the public use, and whilst perhaps the presumption may be overcome on proof that the corporation is holding it for other purposes, as a mere investment to reap profits and save taxes, and with no ulterior purpose to apply the investment to the use or enjoyment of the public thereafter, yet the onus would be upon the plaintiff in execution to make that proof. If made, then the property held with no purpose to use it for the public at the time of the levy or thereafter, might be subjected to pay the debt by that process.

See *Adams v. City of Rome*, 59 Ga. 765; *Fleishel v. Hightower*, last term.

The Maryland case goes even further, and exempts all property held by a municipality for any purpose. *Darling v. City of Baltimore*, 51 Md. 1.

Our opinion given above goes far enough on the same line for all practical purposes, and is, we think, sound and reasonable.

Judgment affirmed.

Stokes v. Tift.

STOKES v. TIFT.

(64 Ga. 312.)

Negligence — owner of bridge.

The proprietor of a toll-bridge is bound only to ordinary care and diligence

ACTION of damages for personal injury. The opinion states the case. The defendant had judgment below.

D. P. Hill, for plaintiff in error.

D. H. Pope, for defendant.

JACKSON, J. The case was for damage received by plaintiff in person in crossing a toll-bridge of defendant. The verdict is for defendant. The evidence is conflicting, but is sufficient to sustain the verdict.

The error of law complained of is that the court declined to charge the jury that "when there is a defect in a toll-bridge which is not open and exposed to all, and the proprietor of the bridge knows of the defect, and allows persons to cross on the bridge and takes toll for crossing, then the proprietor is liable for damages resulting from said defect." We think that the charge requested is too broad. If the proprietor knew that the defect in the bridge was *dangerous* and likely to result in the damage, then we would hold him liable; but not for any defect, however slight, which, contrary to his expectations and belief, resulted in unforeseen and unexpected damage. He is only liable for ordinary care. *Tift v. Towns*, 53 Ga. 47. That case arose on the same state of facts as this, and covers this. It is presumed that the law was given in accordance with the ruling there, and the court there say that the evidence is sufficient to uphold a verdict for either party. Besides, the request is too broad in this, that its language is "open and exposed to all," whereas this plaintiff may have known as much about it as the proprietor did. See also the same case (*Tift v. Towns*), decided this term — where we uphold the verdict for plaintiff in part on similar facts as here; and though it looks odd for juries to give different verdicts on similar facts, yet that is their business.

Our rule, as a reviewing court, is one of law, and it is not to interfere with the jury on conflicting facts where the presiding judge declines to do so.

Judgment affirmed.

COX V. STATE.

(64 Ga. 374.)

Criminal evidence — res gestæ — antecedent declarations of deceased.

Where two agree to arm and fight, and then separate and arm, and meet within an hour and fight, and one is killed, the declarations of the deceased in the interval to a third person, to the effect that the other party was seeking his life, are admissible in evidence on an indictment for murder. (*See note, p. 83.*)

CONVICTION of murder. The opinion states the facts.

D. P. Hill & Son, Gartrell & Wright, Candler & Thomson, D. F. & W. R. Hammond, J. A. Billups, R. S. Jefferies, W. R. Hodgson, for plaintiff in error.

B. H. Hill, Jr., solicitor-general, Hopkins & Glenn, Patrick Calhoun, Duncan Twiggs, Sam. Hall, Hulsey & McAfee, Howard Van Epps, for State.

BLECKLEY, J. [Omitting other matters.] Before proceeding to discuss the admissibility of the declarations and conversations referred to in the fifth, sixth, seventh and ninth grounds of the motion for a new trial, it is necessary to get a correct standpoint from which to consider them in reference to the question of whether or not they constituted a part of the *res gestæ*. To do this requires a survey of the hostile enterprise which had its inception during the private interview of the parties in the back room of the barber-shop, and of the several steps which each party took to advance or retard the collision which that enterprise contemplated. That there was a hostile enterprise admits of no doubt, and that it was of a criminal nature, involving a concerted and premeditated ren-

counter with deadly weapons, is equally clear. In his statement made to the jury on the trial, the accused gave this account of it as a part of his recital of what occurred in the back room of the barber-shop: "Then I asked him, 'Come, Colonel, let us sit down here and settle up this matter between us and close up our business now.' He said no, but said, 'Will you go and arm yourself and fight me?' and I said 'yes, I would fight him any way he wanted to, but let us settle our business first.' He said, 'No, you have promised to fight me,' and I said 'if that was necessary I would fight him in any way he chose, and cut it out or shoot it out.' He said, 'Then go and arm yourself and I will do the same.' * * * Colonel Alston said, 'You have agreed to meet me here and fight me; now go;' and as he got to the door he took out his watch, and with it in his hand he said, 'Meet me here in three minutes.' He went out; and I went out, and into Pause's saloon, thinking, as it was a bar-room, and knowing that they usually kept a pistol about such places, that I would get one there." This bar-room was two doors from the barber-shop, and there, according to the evidence of his own witnesses, he inquired for a pistol of three several persons; one of whom he took aside, and on being asked by him what he wanted with a pistol, he replied that he had to meet a man in two minutes. Being asked who it was, he answered, "Bob." His friend saying, "You are not going to fight Bob Alston?" his reply was, "Get me a pistol, you are talking to a dead man." Failing to procure any pistol at the bar-room, he went to a gun store, and there bought one and had it loaded. Having done this, he returned to the bar-room and was heard to say to Hodgson, an old friend of his, "Now I am ready, let's go." He and Hodgson repaired together to the barber-shop and entered the back room, the same in which the hostile meeting had been agreed upon and in which it was to take place. A conversation at once ensued, which Hodgson details thus: "He said, 'I want you to stay right here.' I asked him what for, and he said he had a difficulty with Alston and he wanted me to stay there and see it. I asked him for some explanations, and he said he had no explanations to make, and he wanted me to stay and I would see; and I said, 'That is very strange, that you would bring a friend of yourself into a place to see a difficulty and never give him any explanations about it!' and he said for me to stay there and I would see — that Alston would be there after a while." At

this stage of the conversation, Sams, another witness for the defense, entered, and he too tried to find out what the trouble was, but apparently without success so far as Hodgson could understand. Hodgson proceeds : " I only heard that there was to be some settlement made, but not what it was. I learned from this conversation that Alston had been in there before, but I could not tell what the difficulty was about. I understood from him that Alston had told him, Cox, to meet him there in two minutes, he might have said ten, and he pulled out his watch and said, ' It's time now.' I saw he was excited, and I said, ' He will come, anyhow ; that he was a man of his word, and if he said he would come he would do it.' I tried to get him to wait for him, say ten minutes, and he noted the time, and told Sams to go and find Alston and tell him that he was there waiting for him according to agreement." Sams and Hodgson withdrew together, the former going out to bear the message to Alston, and the latter stopping in the front room of the barber-shop. The accused remained in the back room. Presently, Nelms (another of his witnesses), principal keeper of the penitentiary, entered the front room from the street, and called for an interview, which the accused declined, saying he was " waiting for a friend." After Nelms left, Sams returned, and reported Alston as having said he had reconsidered the matter and would not meet the accused, and that for the latter to attend to his business, and he, Alston, would attend to his. On hearing this report, the accused departed to seek for Alston, saying something to the effect that it was all right, but it did not suit him, and that he would go and see him. He went directly to the capitol, looked in at the treasurer's office, was understood to inquire there for Murphy, who was clerk in that office, went up-stairs to the office of Nelms, inquired there for Murphy or Howard, most probably for Howard, seated himself for a very brief time, then rose and hurriedly withdrew, and descended to the treasurer's office. There he found Alston, who had come in, for the last time, whilst the accused was up-stairs. He accosted Alston with this language. " You promised to meet me down the street and settle this thing, why didn't you do it?" Alston answered he had reconsidered the matter and did not want to have any difficulty. The accused rejoined, " I will brand you." Further conversation ensued, shots were exchanged, each party using the pistol which he had procured for the appointed meeting at the barber-shop. Alston was killed and the accused severely wounded. On

the element of time, the evidence indicates that the homicide took place within forty-five or fifty minutes after the agreement to fight was entered into ; there is scarcely a doubt that it was within an hour, and it is not very improbable that half an hour would cover the whole of the interval. The building in which the fight took place, and that in which it was to take place by appointment, are both upon Marietta street, and are only about 150 or 200 yards apart.

Having, in the light of the evidence, traced the accused from the beginning to the ending of the criminal enterprise, let us follow the deceased in the same way. After leaving the barber-shop he first appeared at the office of Nelms, and endeavored to borrow a pistol. There the conversation occurred to which Nelms testified, and the admission of which in evidence is complained of in the 7th ground of the motion for a new trial. From there (Nelms soon following) he went down stairs into the treasurer's office, where he met with Howard and Murphy, and where Renfroe, the treasurer, on his return from dinner, found him. Here he procured a pistol, and here he received, through Sams, the message which the accused sent from the barber shop, and made his reply to it. A conversation in which Howard, Murphy and deceased participated resulted in shaping this reply, and in communicating it to Sams for oral repetition to the accused. It is this conversation as testified to by Murphy that is objected to in the 9th ground of the motion for a new trial. From the treasurer's office he went across Marietta street to Berron's, on Forsyth street, and there met and conversed with Governor Colquitt. Whilst this conversation was in progress, the accused passed up Marietta street on his way from the barber-shop to the capitol. Separating from Governor Colquitt, the deceased went into Berron's, partook, during a stay of two or three minutes, of a slight lunch, and then returned to the treasurer's office and sat down. A brief conversation between him and Renfroe ensued, and this is the matter of complaint in the 6th ground of the motion for a new trial. A step was heard approaching, and Peter McMichael, who was in the room, announced that it was Cox, and deceased ordered McMichael to fasten the door. These remarks one made by McMichael, the other by deceased, and the question to the witness which drew them out on the stand, form the subject of the 5th ground of the motion for a new trial. The accused entered through the door before McMichael could close it, and when he entered, the deceased rose from his chair, and the

final conversation between them began. The shooting followed and hostilities were at an end. The space of time extending from the arrival of deceased at the office of Nelms and the commission of the homicide, was about twenty-three minutes. His stay at the office of Nelms was only two or three minutes, and from the time he left there until the firing began was about twenty minutes.

The difficulty of formulating a description of the *res gestæ* which will serve for all cases seems insurmountable. To make the attempt is something like trying to execute a portrait which shall enable the possessor to recognize every member of a very numerous family. Eschewing any thing so impracticable, and letting the present case sit for its own individual likeness, its *res gestæ* may be sketched in general language as follows: (1) Where two persons consent to fight with deadly weapons, and by agreement separate to arm themselves, both intending to return presently and begin the combat, and they do in fact arm themselves and meet, though not at the place appointed, but near it, in the same city and on the same street, and only a little later than the time contemplated, and actually fight with the weapons thus prepared, and one of them is slain by the other, the *res gestæ* of the transaction comprehend all pertinent acts and declarations of the parties (either or both) which take place in the interval between the agreement to fight and the consummation of the homicide, such interval being very brief. (2) Acts are pertinent as a part of the *res gestæ* if they are done pending the hostile enterprise, and if they bear upon it, are performed whilst it is in continuous progress to its catastrophe, and are of a nature to promote or obstruct, advance or retard it, or to evince essential motive or purpose in reference to it; and declarations are pertinent if they are uttered contemporaneously with pertinent acts, and serve to account for, qualify, or explain them, and are apparently natural and spontaneous. See the works on Evidence, and the cases they cite. Also the cases cited in Hopkin's Penal Laws, §§ 527, 528, 530. Code, §§ 3771, 3773.

[Omitting other points.]

The matter embraced in the 6th ground of the motion for a new trial followed immediately upon the return of the deceased from Berron's and his seating himself in the treasurer's office, and was succeeded immediately by the matter set forth in the 5th ground. The evidence complained of in these two grounds, when thrown together, reads thus: "He (Alston) stated to me, 'this is an awful

Cox v. State.

thing to have a man hounding you in this way.' I asked him, 'did you not meet Cox?' He said, 'no he has gone up stairs hunting me'—and then it was that Peter made the remark that Cox was coming down stairs. Peter said, 'Col. Alston, Cox is coming down the steps now;' and Alston said, 'go and fasten that door'—and Peter went to do so, and met Cox there, and Cox passed him and came into the room." Let it be borne in mind that it was from this very office that the deceased had sent his answer to the message of the accused received through Sams; that after receiving that answer the accused had set out from the barber-shop to seek him; that it was to this office that he first went on reaching the capitol; that the deceased, while at Berron's in conversation with Governor Colquitt, had seen him on his way to the building, and that at the time the deceased returned from Berron's, he was in fact up stairs in the building, and it will be plain that neither of these parties had passed wholly out of the *res gestæ* of their pending difficulty. Both were still armed with the prepared weapons, and both may have desired and intended to use them. The return of the deceased to the treasurer's office, and there stopping as if to remain, were acts of undoubted pertinency, and the state of mind in which they were performed—the motive and purpose which attended them—are of the utmost importance. If he went there to put himself in the way of the accused and bring on a collision, and if the accused went with a like object, it was essentially the meeting which had been pre-concerted in the barber-shop, and the deceased had either never fully abandoned the hostile scheme, or had abandoned it but temporarily and then returned to it. If on the other hand, he went to the office perplexed and undecided—doubtful for the time, what course to pursue, and hoping, without seeming to retire, to have opportunity for further reflection, and perhaps to take counsel of a friend (for he had listened there to counsel a few minutes before), his return was well nigh innocent, and not inconsistent with the change of mind which he had professed, and which he afterward asserted in answering the first question which the accused so sharply propounded in the fatal interview. His exclamation to the witness Renfro, on coming in and sitting down, "This is an awful thing to have a man hounding you in this way," indicates mental torture of a bitterly regretful kind, and if he really felt the agony which his language would suggest, he was deprecating danger rather than desire to en-

counter it. His answer to the question, "Did you meet Cox?" namely, "No; he has gone up stairs hunting me," is to be looked at in its relation both to the exclamation which he had just uttered and to the order which he afterward gave to fasten the door. Instantly, upon being told that Cox was coming, he ordered the door which was between them to be fastened. Taking collectively his three utterances, they tend strongly to show the state of mind in which he was. They signify that he believed Cox was searching for him with a hostile intent; and that belief, most probably, induced the order to fasten the door. Under the circumstances, the order was equivalent to an attempt by the deceased himself to fasten the door, and if he had made the attempt, can there be a doubt that the preceding observations would have cast light on his motive for the action? In the same way, they cast light on his motive for giving the order. The entire conversation is thus within the atmosphere of the *res gestæ*. Considering that the deceased had returned to the treasurer's office knowing that the accused was in the building, and that both were still armed, the return was an ambiguous act, with rather more of a hostile than of a pacific look. His remaining there was also ambiguous; it might mean war or it might mean peace. What he said and did in the brief interval between his return and the entry of Cox, tended to explain his presence on what proved to be the scene of the rencounter, and to show whether he was there for action or inaction — whether to meet his adversary or to avoid him. It was competent evidence. The question by which some of it was drawn out was not in the best form, but the court gave the witness to understand that his answer was to be restricted to what he saw and heard, and it was restricted accordingly. The witness simply detailed the facts, offering no opinion or conclusion of his own.

9. Returning to the conversation proved by Nelms (7th ground of the motion for a new trial), the true ground upon which the admissibility of the otherwise doubtful matters of that conversation stands, is that they constituted a part of the same conversation into which the witness entered on his direct examination by the accused, and were drawn out on cross-examination. Upon the direct examination the witness testified: "It was probably three o'clock in the day that Col. Alston came in and asked me for a pistol, and I said mine was at home shot out, and I asked him what he wanted with it, and he said he had liked to have had a difficulty,

Cox v. State.

and I said, come in and tell me about it, and he came in and sat down. I asked him who it was with, and he said it was with Ed. Cox, and told me about it." In the cross-examination, the witness was directed to state all the conversation and he proceeded through it from where he had left off. Not to look further for authority, this was clearly proper under several decisions of this court. *Rolfe v. Rolfe*, 10 Ga. 145 (text of opinion); *Broion v. Upton*, 13 id. 505; *Long v. State*, 22 id. 40; *Tilman v. Stringer*, 26 id. 172.

[Omitting other matter.]

Judgment affirmed.

JACKSON, J., concurred; WARNER, C. J., dissented.

NOTE BY THE REPORTER. — The doctrine of this case is at least doubtful. WARNER, C. J., dissenting, said: "The illegal part of Renfroe's testimony was in proving by Alston's mere declaration, 'that the defendant had gone up-stairs hunting him.' The defendant had a perfect right to go up-stairs in the capitol building, and there is not a particle of evidence in the record, either by word or act on the part of the defendant himself, going to show that he had gone up-stairs hunting Alston, and surely he ought to be judged by, and held responsible for, his own acts and declarations, and not by the acts and declarations of other people made behind his back, the more especially as in this case Alston was not in the capitol building when the defendant entered it, but was standing at Berron's in full view of the defendant as he passed along the street, going into the capitol building where it was said he was hunting him. Is the law so unreasonable as to make one man responsible for what another man may say he is doing, or going to do, behind his back, when he has no opportunity to deny or contradict the statement? Such has not heretofore been my understanding of it. The hunting of the deceased by the defendant was a most damaging fact against him on his trial, and how was that damaging fact proved? It was proved by the mere declaration of the deceased to Renfroe behind his back, when he had no opportunity to deny or contradict it; and the same remarks are applicable to the declarations made by the deceased to Nelms in regard to the acts and sayings of the defendant at the barber-shop. But it is said this evidence was admissible as *res gestæ*. What is *res gestæ* as defined by the law of this State? 'Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, are admissible in evidence as part of the *res gestæ*.' Code, § 3773. The declarations of Alston when he applied to Nelms for his pistol would be admissible in his favor in explanation of that act, and perhaps his declarations to Renfroe might be admissible in his favor in explanation of his own acts and conduct at the time as part of the *res gestæ*, but how Cox, the defendant, can be made responsible by Alston's declarations made to Renfroe and Nelms behind his back, and used in evidence to injuriously affect the defendant as part of the *res gestæ* accompanying any act of his, or connected therewith when the declarations were made, is more than I can understand. In my judgment it was a total misapplication of the doctrine of *res gestæ* to admit the evidence complained of in the 6th and 7th grounds of the motion as against the defendant."

In the celebrated *Hayden* case, tried about two years ago, the prisoner was indicted in Connecticut for the murder of Mary Stannard. The supposed motive for the murder was the alleged pregnancy of the deceased by the prisoner, a married man. The victim was found dead in a certain piece of woods. On the hearing evidence was admitted of the declarations of the deceased, on the day of the murder, that she was pregnant by Hayden, that she had seen him that day, that he had promised to get her some medicine, and that she was going to the woods to meet him and receive it. This case never received the examination of an appellate court.

The following are the leading cases involving the doctrine of the principal case:

In *Reg. v. Edwards*, 12 Cox's C. C. 230, on the trial of a prisoner for the murder of his wife, a neighbor swore that a week before the alleged crime was committed, the deceased visited her house, bringing an axe and carving-knife, and gave them to her to take care of. It was held that evidence of what the deceased then said to the witness was admissible, and this was to the effect that her husband always threatened her with them, and she felt safer when they were out of the way.

In *Reg. v. Buckley*, 18 Cox's C. C. 293, an indictment for murder of a policeman, the deceased, in the course of his duty, in the absence of the accused and shortly before the attack that caused his death, made a verbal report to his superior officer as to where he was going and what he was going to do when wounded. *Held*, admissible. No reason was assigned. The statement was that he was going to watch the prisoner. It should be remarked that it was an official report made in the course of official duty.

In *Reg. v. Watnwright*, 13 Cox's C. C. 111, a murder case, Lord Chief Justice Cockburn refused to admit evidence of a declaration of the deceased, on the day she was last seen alive, as to where she was going. He said: "It was only a statement of intention which might or might not have been carried out. She would have gone away under any circumstances. You may get the fact that on leaving she made a statement, but you must not go beyond it." A similar ruling was made by Lord Chief Justice Bovill, in *Reg. v. Pook*, 14 Eng. (Moak), 625, note.

In *Kirby v. State*, 7 Yerg. 259, an indictment for murder, evidence was admitted of the declaration of the deceased, on the evening before he was missed, that he was going to the Pine mountain, to hunt a saltpetre cave. The court said: "It is part of the transaction; explains the reasons why Elrod was in the Pine mountain, and constitutes a fact in the case." "This declaration, made, as it may be said, while on his way, and explaining the reason of his going, constitutes an important fact to elucidate the question of his death." But a declaration, "shortly before his death," that he had been to the mountain, and was going out shortly again, was held inadmissible. There was nothing in the evidence admitted tending to charge the prisoner with the murder, by the mere statement of the deceased. This does not come up to the *Hayden* case.

In the same case on the subsequent trial (9 Yerg. 383), evidence was admitted of the statement of the deceased, not only that he was going to the Pine mountain, but also that the prisoner was to accompany him, and show him a saltpetre cave. For this error a new trial was granted. The court said: "Now how does this statement constitute any part of the thing doing? Whether Kirby was to accompany him or not, could not affect his intentions in going to the mountain, nor could his statement of that fact tend to explain his purpose in going there. His declaration of his own purpose is evidence, because it explains his intentions, and his intentions constitute part of the thing he was doing. He was travelling, and as he was going he had certain intentions, and as these intentions could only be known by his declaration of them, such declaration is evidence. But it is impossible that Kirby's going with him could constitute any part of the thing which he was doing, which was his own journey."

State v. Howard, 33 Vt. 380, was an indictment for procuring miscarriage on Olive Ashe, producing death. Olivia, the twin sister of the deceased, who went with her to the defendant at the time in question, was permitted to testify that she supposed Olive to be pregnant, and that Olive "left Sutton to get an abortion procured, as was understood between us at the time we left." On setting out, as she testified, they had not determined where to go, but afterward went to the defendant's, and Olivia was there cognizant of the entire operation. The court said: "The mere act of going was equivocal; it might have been for professional advice and assistance. The declarations were of the same force as the act of going, and were admissible as part of the act." It will be seen that this falls short of the *Hayden* case. There was nothing in the declaration of the deceased tending to show that the prisoner had determined to commit a crime, or to fasten a crime on him by her preliminary statement.

In *Hunter v. State*, 40 N. J. 495, 536, a man, afterward murdered, made statements to his son, and wrote a note to his wife, a few hours before leaving home on the night of the murder, to the effect that he was going to the city of C. on business, and that the prisoner was going with him. *Held*, such statements, both oral and written, were admissible as ex-

Cox v. State.

planations and preparations of the act of going from home. The court said: "Now I think I may safely say that there are few problems involved in the law of evidence more unsolved than what things are to be embraced in those occurrences that are designated in the law as the *res gestæ*. The adjudications on the subject, more especially those in this country, are perplexingly variant and discordant. I can readily find judicial rulings by force of which this testimony would be excluded; but I can as readily find other rulings of equal weight that would sanction its admission. This result has grown out of the difficulty of applying, with any thing like precision, general rules to a class of cases of infinite variety. In the well-considered case of *Lund v. Inhabitants of Tyngsborough*, 9 Cush. 42, it is said: 'The *res gestæ* are different in different cases; and it is perhaps not possible to frame any definition which would embrace all the various cases which may arise in practice. It is for the judicial mind to determine, upon such principles and tests as are established by the law of evidence, what facts and circumstances in particular cases come within the import of the terms.' In the present instance the test thus indicated will be found, I think, in the rule that such declarations as these are admissible, because they are so connected with an act, itself admissible as a part of the *res gestæ*, as to have become incorporated with it. The declaration and the act must make up one transaction. The theory justifying this course is, that when such declarations are thus coupled with a provable act, they receive confirmation from it; but if they stand alone, without such support, they depend altogether for their credence on the veracity of the utterer, and thus conditioned they are pure hearsay, and inadmissible. Alluding to the rule that excludes hearsay, Mr. Starkie, vol. 1, p. 65, says: 'The principle does not extend to the exclusion of any of what may be termed real or natural facts and circumstances in any way connected with the transaction, and from which any inference as to the truth of the disputed fact can reasonably be made.' The present point of inquiry therefore is whether these declarations of Mr. Armstrong to his son, and his similar declaration contained in the note to his wife, can reasonably be said to be component parts, or the natural incidents of the act of the deceased in going to Camden, which act was incontestably a part of the *res gestæ*. After mature reflection and a careful examination of the authorities, my conclusion is that these communications of the deceased should be regarded as constituents of that transaction, for I think they were preparations for it, and thus were naturally connected with it. In the ordinary course of things it was the usual information that a man about leaving home would communicate for the convenience of his family, the information of his friends or the regulation of his business. At the time it was given such declaration could, in the nature of things, mean harm to no one; he who uttered them was bent on no expedition of mischief or wrong, and the attitude of affairs at the time entirely explodes the idea that such utterances were intended to serve any purpose but that for which they were obviously designed. If it be said that such notice of an intention of leaving home could have been given without introducing in it the name of Mr. Hunter, the obvious answer to the suggestion I think is, that a reference to the companion who is to accompany the person leaving is as natural a part of the transaction as is any other incident or quality of it. If it is legitimate to show by a man's own declarations that he left his home to be gone a week, or for a certain destination, which seems incontestable, why may it not be proved in the same way that a designated person was to bear him company? At the time the words were uttered or written they imported no wrong-doing to any one, and the reference to the companion who was to go with him was nothing more, as matters then stood, than an indication of an additional circumstance of his going. If it was in the ordinary train of events for this man to leave word, or to state where he was going, it seems to me it was equally so for him to say with whom he was going. I think Mr. Wharton has well described that assemblage of acts and their incidents that make up the *res gestæ*. He thus writes: 'The *res gestæ* may therefore be defined as those circumstances which are the undesigned incidents of a particular litigated act, which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for, or emanations of such act, and are not produced by the calculated policy of the actors.' This definition obviously embraces

the declarations now challenged, for they were immediate preparations for the act in question, and were certainly not produced by the calculated policy of the actor who gave utterance to them. I am unable to see that the reference made to Mr. Hunter by the deceased was not as closely combined with the probable act of his going to Camden as were the inquiries made by Parkman as he passed through the streets of Cambridge, for the house of Dr. Webster, and those inquiries were admitted as evidence by Chief Justice SHAW. Report of *Webster's* case. It is true that in that instance the inquiries happened to be precisely contemporaneous with the act being done; but all the authorities admit that it would be absurd to require exact coincidence in point of time between the doing of the act and saying of the words explanatory of it. Thus, in the case already cited from 9 Cushing, it is said: 'So declarations, to be admissible, must be contemporaneous with the main fact or transaction; but it is impracticable to fix by any general rule any exact instant of time, so as to preclude debate or conflict of opinion in regard to this particular point. Lord DENMAN is quite strong in his expressions on this subject, for in *Rouch v. Great Western R. R. Co.*, 1 Q. B. 60, he uses this language: 'The principle of admission is, that the declarations are *pars rei gestæ*, and therefore it has been contended that they must be contemporaneous with it; but this has been decided not to be necessary on good grounds, for the nature and strength of the connection with the act are the material things to be looked to, and although concurrence of time cannot but be always material evidence to show the connection, yet it is by no means essential.' In the case now under consideration these declarations are so naturally, and therefore strongly, associated with the act in contemplation, that in my estimation the most exact contemporaneousness of the two things would give no additional force to the connection between them. There is nothing in the case to countenance the notion that any change of purpose occurred between the time of the expression of such purpose and the execution of it, so as there is no extraneous interference, the disclosure of the intention and its performance may be said to be, within the meaning of the authorities, one entire transaction. It is principally from the foregoing considerations that I find myself constrained to think that the declarations under discussion, even if they stood in the case unsupported or unaffected by other circumstances, were admissible, on general principles, on the single ground that they were natural and inartificial concomitants of a probable act, which itself was a part of the *res gestæ*. In such a status of the evidence I should think that the exception to the principle that rules out hearsay had been carried to its extreme limit, but without transcending such limit."

In this case, it must be observed, there was nothing in the declarations going to charge the prisoner with any criminal intent or motive.

In *Douglas v. Chapin*, 26 Conn. 76, the plaintiff's intestate had contracted to go to California and take charge of defendant's steamboat. In an action on the contract, it was held that his statement on leaving San Francisco, that he was going up the river to Sacramento to go on board the boat, was admissible, as part of the *res gestæ*, in proof that he so went. The court simply said, "it was manifestly a part of the *res gestæ*."

In *State v. Dula*, Phillips, 211, the deceased was met a few miles from the place where she was murdered, going on horseback in that direction. It was held that her declarations then and there that she was going to that place to meet the prisoner were inadmissible in evidence. The court said these declarations may have been true or may have been false, but were not verified by the tests which the law of evidence requires, namely, the sanction of an oath, and an opportunity for cross-examination.

In *People v. Williams*, 3 Abb. Ct. App. Dec. 596, on an indictment for poisoning, it was held that evidence that the deceased, on going out of the house just before she was poisoned, said she was going to meet the prisoner, was not admissible as tending to prove their meeting, even in connection with her illness on her return, and her attributing it to what he had given her to drink. The court, DENIO, J., said: "To render the declaration competent, the act with which it is connected should be pertinent to the issue: for where the act is in its own nature irrelevant, and when the declaration is *per se* incompetent, the union of the two will not render the declaration admissible. The material fact here was that the prisoner and the deceased were together on Saturday night. Even this was not a principal fact, but only a circumstance to show that the prisoner had an opportunity to commit the offense. That the deceased left the house in Duane street at a particular time was of no materiality unless it was also shown that during her absence she met the defendant. The

Cox v. State.

act itself was indifferent to the issue, whatever the intention with which it was done. If the deceased met the prisoner, and thus afforded an opportunity of committing the offense, it is immaterial whether she expected or intended to meet him or not; and so of course if she failed to meet him, he could not properly be prejudiced by the circumstance that she went out with a design to go to him. The evidence was not offered to qualify an act connected with the issue, but to induce the jury to infer another act not otherwise shown to exist, that of his being in company with the deceased. Suppose a declaration had been made by the deceased, on the previous day, of an intention to go to her husband on that particular evening; such declaration, being unaccompanied by any act, would rest wholly in assertion, and would be clearly without the rule referred to; yet the proof would be essentially of the same character, and subject to no greater objections than the evidence we are considering. I am of opinion therefore that the case was not within the rule admitting a declaration accompanying an act, on the ground of its being a part of the *res gestæ*." "A majority of the judges concurred."

In *Carroll v. State*, 3 Humph. 315, the declarations of the deceased while on a journey with the prisoner, and in *State v. Vincent*, 24 Iowa, 510, his declarations as to the object of a contemplated journey which he afterward took, were received in evidence. In neither case was there any thing in the declarations tending to fasten any criminal intent on the prisoner.

In *Cheek v. State*, 35 Ind. 492, a witness was allowed to testify to the following declaration by the deceased concerning the prisoner just before his death: "Doc, I am glad you have come; there are two ruffians going up the road, and they have threatened to take my life; they have gone to my house, and I want you to go back with me." The court said: "Was it *res gestæ*? We think not. Bouvier says: 'When it is necessary, in the course of a cause, to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it is admissible evidence as a part of the *res gestæ*, for the purpose of showing its true character.' We think the books may be searched without success, to find a case where the statements of a murdered man, made before he came in sight or hearing of his slayer, can be given in evidence against the accused on his trial." Of this case Mr. Bishop says (2 Crim. Proc. § 635, n. 2): "This may be putting it strong; but in substance the statement is doubtless correct as applied to such a case."

The case of *State v. Dickinson*, 41 Wis. 299, is very much like the *Hayden* case in its circumstances, but the decision steers a middle course. This was a criminal action for procuring the death of a pregnant woman by abortion. It was claimed that the death occurred on Saturday. The witness, Mary Erickson, was permitted to testify as to conversations had by her with the deceased on the previous Wednesday and Friday, in which the deceased stated that she understood or had found out that she was in a family way; that she had been to see the defendant about it; had been or was going to defendant to get medicine and syringe; that she had made an arrangement or bargain with defendant to have an operation performed upon her; was to give \$25, and was to return to defendant's on Saturday afternoon for the purpose of having instruments used to get rid of the child. The prosecution offered this evidence to show that the deceased had at that time the intention of having an abortion produced. In his charge the judge so restricted the effect of the testimony, and directed the jury that all the declarations of the deceased made before she was informed she could not live, in which the defendant's name was connected, could only be considered as evidence tending to show that at that time the deceased had formed the purpose to go to the defendant to have an abortion produced upon her, but was not evidence that the defendant actually produced the abortion or had engaged to do it. The court on review said: "The first inquiry is whether the declarations of deceased to Mary Erickson were admissible for the purpose of showing her intention, and as their scope and effect were restricted by the court, we are of opinion that they were. They constituted a part of the *res gestæ*, were contemporaneous with the main fact under consideration, and were so connected with it as to illustrate its character. 1 Greenl. Ev. 108. It was certainly competent to prove that the deceased went to the house of the defendant at the time it was charged in the information the abortion was produced. Upon the authorities, her intent or purpose in going there might be shown by her declarations then made or previously made, because such declarations became a part of the *res gestæ*. For it is

evident the declarations were connected with the act of her going to the defendant, were expressive of the character, motive or object of her conduct, and they are to be regarded 'as verbal acts indicating a present purpose or intention, and therefore are admitted in proof like any other material facts.' 1 Greenl. Ev., *supra*; *Insurance Co. v. Mosley*, 8 Wall. 897; *Enos v. Tuttle*, 8 Conn. 27; *Inhabitants of Corinth v. Inhabitants of Lincoln*, 34 Me. 310; *Lund v. Inhabitants of Tyngeborough*, 9 Cush. 36; *Nutting v. Page*, 4 Gray, 581; *State v. Howard*, 33 Vt. 380; *Moore v. Meacham*, 10 N. Y. 207; *People v. Davis*, 56 Id. 96. It is obvious that the mere act of the deceased going to defendant's house was equivocal; it might be innocent or not; it might warrant the inference that she went for proper treatment of some ailment; the declarations would render her motive clear and intelligible. They therefore seem to us as falling under the denomination of the *res gestæ*, and were admissible as original evidence as distinguished from hearsay.

"In *State v. Howard*, *supra*, the declarations of the deceased, Olive Ashe, as to the purpose of the journey in going to the defendant's, were held by the court to be admissible as part of the *res gestæ*. Upon this question REDFIELD, C. J., observes that 'the mere act of going was equivocal; it might have been for professional advice and assistance. The declarations were of the same force as the act of going, and were admissible as part of the act.' In *People v. Davis*, when the deceased came home, in answer to inquiries from her step-mother she made statements telling what had been done to her by Dr. Crandall at his office, and how he did it, exhibiting certain medicine which she said the doctor gave her, and stated what he told her as to taking it when her pains came on. The court held these declarations incompetent because they were merely narratives of past occurrences, did not become a part of the thing done at the doctor's office, and were therefore no part of the *res gestæ*. But the court say: 'Had it been shown that the medicine was to be taken to aid in producing the miscarriage, what was said in respect to it would have been admissible.' P. 108. The conclusion which we have reached in view of all the cases upon the subject is, that the declarations of the deceased made to the witness Mary Erickson were so connected with her act of going to the defendant's as to constitute a part of that act, and were admissible as explanatory of that act. See *Regina v. Edwards*, 12 Cox's Cr. Law Cas. 280."

Remarking on these cases the *Albany Law Journal* says: "This case seems to us, like most compromises, exceedingly weak. In saying 'such declarations become a part of the *res gestæ*,' the court beg the whole question. In deciding that the declaration of the intent to go to the defendant's to have him commit the crime was admissible to show the purpose of the deceased, but not to show that the defendant carried it out, the court clearly admitted irrelevant evidence, for that intent of the deceased was quite outside the issue. The issue was whether the prisoner committed the crime. If he did the intent of the deceased was immaterial; if he did not it was equally immaterial. In any light the evidence could only tend to convict the prisoner by the declaration of a purpose on his part which may never have been carried out. The cases cited are very inconclusive. The citation from New York is a mere dictum, and not one of the powerful authorities which we have cited to the contrary was produced."

"It need not be conceded that if the former case is law it goes far to sustain the ruling in the *Hayden* case, for it simply admitted past threats, while in the latter case evidence was admitted of what had not happened and might not happen. The *Hayden* case, too, is inconsistent with the *Wainwright* and *Pook* cases in England. The *Dula*, *Williams*, *Kirby* and *Cheek* cases seem to us to lay down the proper doctrine. It will be noticed that all the contrary cases which we have cited are distinguishable from the *Hayden* case in that the declarations received did not in any instance convey an intimation of criminal intent or motive on the part of the prisoner. We regard the *Hayden* ruling as unsound and dangerous, and cannot see that it is supported by any authority in this country, further than to the extent of the intended meeting with the prisoner, and even as to that extent it is strongly opposed to the *Dula*, *Williams*, *Kirby* and *Cheek* cases. On principle, the admission of antecedent declarations is much more dangerous than the admission of subsequent or contemporaneous declarations. The latter are generally attended by corroborative circumstances, and are of a character appealing more directly to the conscience; while the former may be entirely false or gratuitous, or if made in good faith, may not be supported by subsequent facts. It is quite possible, for example, that *Hayden* did not

 Mayor, etc., of Americus v. Eldridge.

meet Mary Stannard in the woods, although she may have expected him. It is quite possible that whether he did or not he had never agreed on the meeting for the purpose indicated by her. On the other hand, if she had been found there alive, there would have been some show of reason for admitting her contemporaneous declaration that Hayden had tried to kill her to conceal her pregnancy. At all events, both on authority and principle, if her previous declaration that she was going to the woods, or was going to the woods to meet Hayden, was competent, her accompanying declaration of the motive and purpose of the meeting was clearly incompetent. People cannot be put to death upon hearsay evidence before the fact."

MAYOR, ETC., OF AMERICUS V. ELDRIDGE.

(64 Ga. 524.)

Municipal corporation — sewer — inadequate capacity — injunction.

A municipal corporation, authorized to open and lay out streets, construct sidewalks, and levy taxes therefor, may construct a street sewer for surface water, and a lot owner cannot enjoin the construction on the ground that it is proposed of inadequate size.

INJUNCTION. The opinion states the facts. The injunction issued below.

Hawkins & Hawkins, for plaintiff in error.

N. A. Smith, for defendant.

CRAWFORD, J. The controversy in this suit arose out of the size and location of a sewer by the plaintiff in error, at the intersection of Taylor with Lee street, and which was immediately in front of the residence of the defendant in error, who was complainant in the court below. His allegations were, that the diameter of the sewer was only two feet, whilst it should be three to carry off the water in the heaviest rains. That this want of size will at such times cause the water to run over the sidewalk into the yard, cellar, and back-lot, and that this flooding of his premises, especially under his house, would be very likely to produce sickness, besides otherwise damaging his lot by washing off the soil. That when he improved his lot, he, by the consent of the then city council, turned the water slightly, and carried it into a ditch in which, it has passed ever since. That the cost to the city would only be the difference between a two and a three foot sewer for the distance of some ten or

twelve feet. Upon these allegations he prayed an injunction against the city council to restrain it from putting in this sewer across and underneath the sidewalk.

In obedience to an order *nisi* the defendant appeared, and as its showing against the granting of the injunction, filed objections in the nature of a demurrer, which were:

1. That the city had power under its charter to open streets, construct sidewalks and sewers.

2. That the city council was not liable to an action for failing to provide sewerage, nor for the deflection or the size thereof.

3. That there was no equity in the bill.

The chancellor, declining to pass upon the bill and the objections alone, heard the answer and the affidavits, and thereupon granted the injunction, to which the defendant excepted.

There are but two questions involved in this case. The first is, whether the city council under the power "to open and lay out streets for the good of the city, to direct and have sidewalks kept in order, and to levy a street tax" for working the same, is authorized to put in a sewer to conduct the surface water along its streets instead of allowing it to pass in an open ditch.

The second, whether or not an injunction will lie by an adjacent property owner to restrain the city authorities from exercising such control over the public streets and sidewalks as in their judgment will make them most suitable for the public safety and convenience.

1. Whenever there is a power granted to a municipal corporation to do certain specified things, such as opening and laying out streets, constructing sidewalks, coupled with authority to levy taxes for repairs to the same, it necessarily implies the right to do all things which may be required for a proper execution of the power.

The complainant built his house at a low point fronting Taylor street; there is a sharp and steep declivity on this street facing his house, down which the water runs, and is carried away by means of an open ditch, and the city proposes to convey that water through a sewer inserted therein upon the sidewalk, and in no wise encroaching upon the lot of complainant. The power to repair the streets and direct the keeping of the sidewalks, implies the power to provide for the flowing of the water in such way as to do the least damage, and to give safe transit over them to the public.

We think that this principle has been too long settled to need

Mayor, etc., of Americus v. Eldridge.

further comment here. 1 Dill. Mun. Corp., § 58 ; *Smith v. Washington*, 20 How. 147.

2. The second question as to the right of the adjacent property owners to ask an injunction to restrain the exercise of such a power, as well as the right to an action at law for damages, has been frequently before the courts. It will be found upon the examination that in the matter of overflowing the lands of another, there is a recognized difference between natural streams, passing within well defined and actual banks, and surface water caused by rain or melting snow. The obligation to keep the streets in repair involves the right to make changes in the surface of the ground, and although such changes affect the adjacent owners injuriously, where the power is not exceeded there is no liability. Neither is the municipality bound to protect one from the surface water who owns land below the level of the street.

A municipal corporation is not liable to an action for consequential damages to private property or persons when the act done is pursuant to a power conferred, and whether wise or unwise cannot be judicially revised or corrected. 1 Dill. Mun. Corp., § 59 ; 2 id., §§ 781, 798, 799.

We are unable to recognize any difference in principle between damages sustained whilst exercising a clear legal right, by reason of cutting away the earth and leaving the property of an owner inaccessible from its elevation, and the case under consideration ; each bought and improved with the knowledge that the right existed in the city over the streets to work, to raise, to grade, to drain, and unless that legal right was exceeded, it would be but a case of *damnum absque injuria*. The case of a private or public nuisance is not to be confounded with those enumerated.

To suspend by injunction the legally authorized acts of a municipal corporation upon its public streets, for the safe condition of which it is responsible, by adjacent owners upon an apprehension of future injuries, would be to allow the judgment of these private owners to arrest and set aside that of the constituted authorities charged and intrusted with the performance of these special duties. To authorize such interference the acts complained of must be *ultra vires*. *Wilson v. Mayor*, 1 Den. 595 ; *Smith v. Washington*, 20 How. 135 ; *Barry v. Lowell*, 8 Allen, 129 ; *Flagg v. Worcester*, 13 Gray, 601 ; *Wells v. Mayor*, 43 Ga., 67 ; *Roll v. Atlanta*, 34 id., 326 ; *Rome v. Omberg*, 28 id., 46 ; *Markham v. Mayor*, 23 id., 402.

It follows, therefore, that the injunction was improperly granted, and the judgment must be reversed.

Judgment reversed.

WILCOX V. AULTMAN.

(84. Ga. 544.)

Negotiable instrument — payment — non-surrender of instrument.

The drawer of a draft paid the amount of it to the indorsee, who had not the possession of the draft, but agreed to get and surrender it, and gave a receipt in full of it. *Held* that this did not protect the drawer against a suit on the draft by the *bona fide* holder to whom the indorsee had transferred it.

ACTION on a draft. The opinion states the facts. The defendant had judgment below.

W. E. Collier, for plaintiff in error.

R. C. Smith, M. D. Stroud, and J. C. Rutherford, for defendant.

WARNER, C. J. This was an action brought by the plaintiffs against the defendant on a draft drawn by him upon Messrs. Adams & Bazemore, payable to his own order, and indorsed by himself, for the sum of \$88.70, dated 20th January, 1870, and due on the 6th day of November thereafter, with a crop lien annexed thereto. The defendant pleaded payment. On the trial of the case the jury, under charge of the court, found a verdict in favor of the defendant. A motion was made for a new trial on the grounds therein stated, which was overruled, and the plaintiffs excepted.

It appears from the evidence in the record, that the plaintiffs became the *bona fide* holders of the draft before its maturity for a valuable consideration, to wit: in the month of August, 1870, receiving the same from Loyd & Sons. The defendant testified that the draft was given by him for one ton of Frank Coe's guano, purchased by him from Bateman, who was the agent of Loyd & Sons; that in the fall of the year 1870 he paid the draft to Loyd & Sons, who told him that they did not have it, but would get it and send it to him in three days, and gave defendant a receipt in full

Rhodes v. Neal.

payment of the draft. The defendant proved the payment of the money to Loyd & Sons, and the taking of their receipt therefor by another witness, so that the question is, whether the payment of the money by the defendant to Loyd & Sons, who did not have the draft at the time, was a good payment in law as against the plaintiffs, who as the evidence shows, were then the *bona fide* holders of the draft. When the maker of a negotiable draft or note pays it to one who has not the possession of the paper at the time of such payment, so as to enable him to take it up, but takes a receipt for the money so paid, instead of taking up his draft or note, such receipt will not protect him from the payment of the draft or note when sued by the *bona fide* holder thereof before due. 54 Ga. 52. In view of the evidence in the record, the verdict of the jury was contrary to law, and it was error in not granting a new trial upon that ground.

Let the judgment of the court below be reversed.

Judgment reversed.

RHODES v. NEAL.

(54 Ga. 704.)

Contract — to procure discontinuance of criminal prosecution — public policy.

An agreement to pay one for endeavoring to induce the complainants in a criminal prosecution for felony to discontinue proceedings, is void.

ASSUMPSIT The opinion states the case. The defendant had judgment below.

Conley & Shumate, for plaintiffs in error.

A. B. Culberson and *E. N. Broyles*, for defendant.

CRAWFORD, J. The plaintiffs in error sued the defendant in error to recover \$750, which they alleged was due to their testator for services rendered in using his influence with the authorities of the Nashville and Chattanooga Railroad Company, to dismiss certain criminal prosecutions pending against Wesley Neal, who was under indictment for larceny and fraudulent breach of trust, and in im-

minent danger of conviction for said crimes. It was further alleged that the prosecutions were dismissed and that the said sum of \$750 remained of \$2,000 which had been deposited as security for the appearance of the said Wesley, and which was to belong to plaintiffs' testator, after the payment of the attorneys' fees and costs, but which the said John Neal, Jr., fraudulently took possession of and converted to his own use.

This case was dismissed on demurrer in the court below, and that ruling is the error complained of here. The cause of action as set out in this declaration evidently shows a contract tending to obstruct the course of public justice, and being such a contract was contrary to public policy, and therefore illegal and void. It is alleged that the party was under indictment and in imminent danger of being convicted of larceny and a fraudulent breach of trust, and being in that condition, the testator was to use his influence with the prosecutors to have the same dismissed and in which he was successful.

If that is not a contract for the purpose of obstructing the due course of public justice in its effort to punish crime, one could scarcely be found. It is sufficient to defeat such a contract if there be a *bona fide* charge against one for felony. It is a high requirement of public policy that felonies shall be punished, and the law frowns upon any attempt to suppress investigation. *Chandler v. Johnson*, 39 Ga., 89; *Howell v. Fountain*, 3 Kelly, 176.

"Public morals, public justice and the well-established principles of all judicial tribunals alike, forbid the interposition of courts of justice to lend their aid to the enforcement of such contracts." 4 Pet. 184.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

FAWSETT V. NATIONAL LIFE INSURANCE COMPANY OF THE UNITED STATES.

(97 ILL. 11.)

Negotiable instrument — transfer — restrictive indorsement.

The payee of a note indorsed it in blank. The transferee filled up the blank, making the note payable to a bank (without the words "or order") for collection on his account. The bank failing to collect, returned it to him, indorsed by its cashier, "without recourse." He then re-indorsed and re-transferred it to the plaintiff. *Held*, a valid transfer. (*See note, p. 99.*)

ACTION on promissory notes. The opinion states the case.

Gardner & Schuyler, for appellant.

Higgins, Furber & Colteran and *Hutchinson & Suff*, for appellee.

CRAIG, J. On the 27th day of August, 1872, The South Chicago Land and Building Association executed and delivered to A. F.

Fawsett v. National Life Insurance Company of the United States,

Fawsett, payable to his order, six promissory notes, one for \$7,375, due in two years, and five for \$8,125 each due in three, four, five, six, and seven years, all bearing interest at eight per cent, payable annually. These notes were secured by a trust deed, given to N. S. Smith, on certain real estate in Cook county.

In January 1873, Fawsett, who was at the time a stockholder in the Globe Insurance Company of Chicago, pledged all of the notes to the First National Bank of Chicago, as security for a debt which the bank held against the insurance company. Fawsett, at the time indorsed the notes in blank and left them with the bank.

In February, 1873, Fawsett gave an order, in writing, to the cashier of the bank, to deliver the notes to the insurance company, on demand, and under this order the company subsequently obtained possession of the notes.

In 1874, Geo. F. Harding became a stockholder in the Globe Insurance Company, and by some means, obtained the possession of the notes. On the back of the note due in six years, and on the back of the one due in seven years, he filled up the blank indorsement of Fawsett, so that it read as follows:

“Pay to the Second National Bank of Monmouth, for collection, for account of Geo. F. Harding, executor of Abner C. Harding, deceased.
A. F. FAWSETT.”

Subsequently, the Monmouth bank returned the notes to Harding, with the following indorsement.

“Without recourse on us.

“F. W. HARDING, *Cashier Second National Bank.*”

Harding then transferred the notes to the First National Bank of Chicago, by an indorsement as follows:

“Geo. F. Harding, executor of the estate of Abner C. Harding, deceased.”

The bank, in due course of business, sold and transferred the notes to appellee, for a valuable consideration, before they were due. The notes, or the proceeds thereof, are now claimed by the original payee, Fawsett, and the question presented by the record is, had appellee, at the time it purchased the notes, such notice of Fawsett's claim or title as would defeat the title it acquired to the notes?

It is not pretended that appellee, when it purchased the notes

Fawsett v. National Life Insurance Company of the United States.

had actual notice that appellant, Fawsett, had any title to or interest in them, but the argument is, that the indorsement written over the signature of Fawsett is restrictive ; that the notes were not, in fact or in law, transferred to the Second National Bank of Monmouth ; that "an indorsement of a promissory note, for collection or for account of another, or for the use of another, is restrictive, and suspends the negotiability of the note while it remains upon it."

It is conceded that Geo. F. Harding, having the possession of the notes, with the blank indorsement of Fawsett, the payee, upon them, whether he obtained the possession rightfully or not, might have sold them to a purchaser for value, and such purchaser would have been protected in his purchase, unless, before the purchase, he had notice of the title of Fawsett.

The question then arises, how or in what manner the purchaser was affected by the indorsement written over the signature of Fawsett by Harding, which was in these words:

"Pay to the Second National Bank of Monmouth, for collection, for account of George F. Harding, executor of the estate of Abner C. Harding."

As there is no pretense that appellee had any other or different notice of appellant's title than such as was contained in the words of the indorsement, the fact that the words "or order" are omitted from the language of the indorsement, is of no importance.

As the negotiability of a bill or note originally transferable can only be restrained by express restrictive words, the words "or order" need not be inserted in full, or any indorsement, to give a bill a subsequent negotiable quality. Chitty on Bills, 257.

Story on Promissory Notes, § 142, in the discussion of the reason of the rule, says : "The reason is, that the direction to pay to a particular person does not necessarily import that it shall not be paid to any other person to whom he may indorse it, but only that it shall not pass without his indorsement."

It will be observed that the indorsement to the Second National Bank of Monmouth was not written by Fawsett. He indorsed the notes in blank, and delivered them to the Globe Insurance Company, and when the notes came into Harding's hands the indorsement of Fawsett was general and absolute. So far as he was concerned he placed the note in the market without any restriction whatever in regard to its negotiability. When the note came into

Fawsett v. National Life Insurance Company of the United States.

Harding's hands he could have transferred the title by a delivery to any person he might find willing to buy. He had the power to transfer the note for collection by a restrictive indorsement, if he saw proper, and he could do this by writing an assignment over the name of the indorser, Fawsett, if he saw proper. When the Monmouth bank, to whom Harding had transferred the notes, failed to collect, and returned them to Harding, he had a perfect right to strike out the indorsement which he had written, and fill up the indorsement to himself. *Bank of Utica v. Smith*, 18 Johns. 238.

By what means, therefore, the relation of Fawsett to the notes was changed by the assignment Harding wrote over his signature, we do not perceive; nor do we see that the negotiability of the instrument was changed so long as Harding, when the notes were returned him, had the right to erase the indorsement and restore the notes to the same condition they were in before the indorsement was placed upon them.

But conceding that the indorsement was, in one sense, restrictive, still the contract of indorsement to the Monmouth bank did not destroy the negotiable character of the notes. In Story on Promissory Notes, § 143, the author says: "It is not perhaps easy in all cases to assert what language will amount to a restrictive indorsement; or in other words, what language is sufficient to show a clear intention to restrain the general negotiability of the instrument, or the general purposes to which the indorsement might otherwise entitle the indorsee to apply it. Where the indorsement is, 'pay to A. B, only' then the word 'only' makes it clearly restrictive, and does not authorize a payment or indorsement to any other party. So if a bill should be indorsed, 'the within to be credited to A. B.,' or 'pay the within to A. B., for my use,' or 'pay the within to A. B., for the use of C. D.,' it would be deemed a restrictive indorsement so far as to restrain the negotiability, except for the very purposes indicated in the indorsement. In every such case, therefore, although the bill may be negotiated by the indorsee, yet every subsequent holder must receive the money subject to the original designated appropriation thereof."

The same author in section 146, says: "Neither will an indorsement to A., or order for my use, restrain its negotiability, although the indorsee must take it subject to my use."

See also Story on Bills, § 211; Bayley on Bills, ch. 5, § 1.

Under the indorsement in question there was nothing that even

Gavin v. City of Chicago.

tended to show that Fawsett, the indorser, had any interest whatever in the notes, or the proceeds when they should be collected, but on the contrary, from the indorsement it appeared that he had parted with the title and all interest in the notes. The only reasonable construction to be placed upon the language used in the indorsement is, that Fawsett, the payee, had transferred the notes to the Monmouth bank for collection, not for himself, but for the benefit of Harding. This, under the authorities cited, did not destroy the negotiability of the instrument, but whoever should purchase would take the assignment for the use of Harding. For instance, if the Monmouth bank had indorsed the notes to a stranger such person would have taken them for the benefit of Harding. But when the notes were indorsed by the Monmouth bank and returned to Harding, then the beneficial interest and legal title were united in him, and any person who might purchase from him, and receive the notes indorsed, is entitled to protection as an innocent purchaser of commercial paper.

The judgment will be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER. — Mr. Daniels says (Neg. Inst. § 698): "The words 'for collection, which are frequently inserted in paper put in bank to be collected, make the indorsement restrictive.'" Citing *Sweeney v. Easter*, 1 Wall. 166. But he continues: "The negotiability of an instrument having been restricted, it may be revived by a subsequent indorsement." Citing *Holmes v. Hooper*, 1 Bay. 160. In *Leavitt v. Putnam*, 3 Comst. 494, it is said: "The defendant's indorsement is a full one, containing the name of the person in whose favor it was made, but omitting the words 'or order,' the legal effect of which was nevertheless to make the note payable to him or his order, and his indorsement was therefore effectual to transfer the note to the plaintiff."

GAVIN V. CITY OF CHICAGO.

(97 Ill. 66.)

Municipal corporation — negligence — swing bridge — infant.

A municipal corporation, maintaining a swing bridge in one of its streets, keeping the same safe for persons using ordinary care, is not bound to erect barriers or station watchmen for the protection of young children playing about the same without the knowledge of their parents.

ACTION for personal injury by negligence. The opinion states the case. A verdict for plaintiff was reversed by the Appellate Court, and plaintiff appealed.

Pliny B. Smith, for plaintiff in error.

Julius S. Grinnell, for defendant in error.

This action was brought by William W. Gavin, by his next friend, against the city of Chicago, to recover damages sustained on account of the loss of his arm, alleged to have occurred through the negligence of the city authorities in not properly maintaining the swing bridge on Eighteenth street. On the trial in the Circuit Court plaintiff obtained a verdict for \$3000, upon which judgment was rendered. That judgment was reversed by the Appellate Court on the appeal of the defendant, and final judgment rendered in that court against plaintiff for costs. Plaintiff brings the case to this court on error.

The accident to plaintiff occurred at the swing bridge over the south branch of the Chicago river, on Eighteenth street, whither plaintiff had gone with other older boys. The bridge had just been swung around to allow a vessel to pass, and as it was being closed the two older boys, in whose company plaintiff was, jumped on the bridge just as soon as the swing part got to the pathway where the people pass on, and one of them called to plaintiff to come on. A witness who saw the accident says, when the plaintiff stepped on the bridge he was on the road bed. He then seemed to be frightened, stood still, and "commenced to shiver." The other boys jumped off, and plaintiff undertook to do the same, but fell forward on his face across the space between the bridge and the abutment, and in some way his right arm got between the bridge and the abutment, and was crushed.

[Omitting questions of pleading and contributory negligence.]

The only remaining question in the case is whether defendant was guilty of negligence in regard to the care and management of the bridge where the accident occurred. No special defect is averred in the declaration to have existed in the bridge, nor are the servants of the defendant charged with any carelessness in the management of the bridge at the time of the happening of the injury to plaintiff. The averments in the declaration are general as to the want of care in maintaining the bridge, and no specific acts of omission of duty in that regard are charged. It was a swing bridge, constructed as such bridges usually are. So far as the evidence discloses its condition it was in perfect order, and was handled with

Gavin v. City of Chicago.

usual care and skill. The only complaint made on the argument is, that there was no barrier of any kind at the approach of the bridge, and no watchman to guard the same to prevent accidents to persons travelling on the street.

Undoubtedly it is the duty of a municipal corporation to keep and maintain such bridges within the corporate limits in a reasonably safe condition. When it has done that it has discharged its duty to the public in that respect. Persons having occasion to pass over such bridges must exercise reasonable care for their personal safety, and the law has laid that duty on all persons. It is not understood to be the duty of such a corporation to so construct its streets and bridges that accidents are impossible to persons using them. That would impose upon them a higher degree of care in this regard than the public welfare demands. Something must always be left to the provident care of persons using them. The bridge in question was reasonably safe to persons observing ordinary care. It had no barrier at the approaches when it was opened to allow vessels to pass. But it is not shown any could have been constructed that would have rendered the bridge more secure than it was. A number of contrivances had been tried on other bridges in the city, and all of them proved to be worthless for the purposes for which they were designed. It was not thought they rendered the bridges any safer, and their use was abandoned. No doubt it would be possible to place a sufficient guard on duty at every bridge that would prevent accidents to careless persons, and to children that might come there to play, or some mechanical contrivance might possibly be constructed that would answer the same purpose ; but the law has not made it the duty of municipal corporations to observe such extraordinary care. The bridge, in the condition it was then in, was reasonably safe for all persons using the slightest care for their own safety. No duty rests on the city to make such bridges safe for children to play around or upon, nor is it expected parents will allow their children to occupy such dangerous places as play-grounds, and if they wander from their homes without the knowledge of their parents, and sustain injury at such places, it must be attributed to mere accident that no care which they are obligated to observe, on the part of municipal authorities, could prevent.

Plaintiff eluded the watchful care of his mother, and in company with others sought this dangerous locality, and while engaged in boyish sports with his little companions sustained painful injury.

Green v. Hewitt.

It was a mere accident, for which no one was really chargeable, and certainly gave plaintiff no cause of action against defendant.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

GREEN V. HEWITT.

(97 UL 118.)

Will — construction — life estate or fee — remainder.

A testator gave and bequeathed to his wife "the farm on which we now reside, situate," etc., "also all my personal property of every description, so long as she remains my widow; at the expiration of that time, the whole, or whatever remains, to descend to my daughter." *Held*, that the widow took only a life estate in the real as well as the personal property, and that the daughter took a vested remainder in both. (See note, p. 104.)

PARTITION. The opinion states the case.

Owen P. Thompson and John G. Henderson, for plaintiffs in error.

H. Case and J. M. Riggs, for defendants in error.

MULKEY, J. The whole controversy in this case turns upon the construction to be given to the second clause of the will of William C. Thompson, through which all the parties claim. It is as follows:

"Second. After the payment of such debts and funeral expenses, I give and bequeath to my beloved wife, Elizabeth Thompson, the farm on which we now reside, situate in said county, and known and described as the north-east quarter of the south-west quarter of section seven, township fifteen, range thirteen, also all my personal property of every description, so long as she remains my widow; at the expiration of that time the whole, or whatever remains, to descend to my daughter, Mary Thompson."

Plaintiffs in error insist that under this provision of the will Elizabeth Thompson took an absolute fee simple estate in the premises therein mentioned, which are the same lands now in controversy, and of which partition is sought by complainants' bill. If she did not take an inheritance, as contended, but a mere life

Green v. Hewitt.

estate, as is claimed by defendants in error, then it is clear complainants showed no title to the premises in themselves, and the demurrer to the bill was therefore properly sustained by the court.

To us there seems no room for doubt as to the proper construction of the clause in question. The devise of the farm and personal estate is expressed in a single sentence, one clause of which relating to the land, and another to the personalty. By their punctuation these clauses of the sentence are merely divided by a comma and are connected by the conjunctive adverb "also," which, in that connection signifies in like manner, or in addition to; that is, the testator gives and bequeaths the farm, and in like manner gives and bequeaths the personalty. Then follows the qualifying or adverbial clause, "so long as she remains my widow," which is introduced for the purpose of limiting the entire gift, both of personalty and realty, to the widowhood of the taker. He gives and bequeaths both only so long as she remains his widow. This is both the grammatical and legal construction of the sentence. The meaning is precisely the same as if the testator had said: "I give and bequeath to my beloved wife, so long as she remains my widow, the farm, etc., on which we now reside, and in like manner I give and bequeath to her all my personal estate." She took a mere life estate in the entire gift. The misapprehension as to the legal effect of the devise doubtless grows out of the use of the expression "whatever remains" by the testator, in limiting the remainder to his daughter. The use of that expression is of no vital significance, and can not be permitted to override the clearly expressed intention that the widow should take a life estate only.

As part of the estate devised was personalty, it is but reasonable to suppose that some of it would be of that species of property whose value and use consist solely in its consumption, such as provisions, etc., and was doubtless the intention and expectation of the testator that property of this character should and would be consumed by his widow, and of course not in existence when her estate terminated. It was also reasonable to suppose that if she lived long as his widow, some of the articles of personalty would be worn out, lost or destroyed; hence in making the limitation over, it was but natural and proper to use the expression "whatever remains." It had reference to the anticipated condition of the personal estate when it would, under the limitation, pass into his daughter's hands. And this is all the significance the expression has.

It is further claimed by plaintiffs in error, as the estate of the daughter was a contingent remainder, and that inasmuch as she died before the termination of the particular estate which supported it, it never vested at all. Counsel are entirely mistaken in this view. The estate of the daughter had not a single element in it that distinguishes a contingent from a vested remainder. There was certainly no uncertainty as to the person who was to take. It was Mary Thompson, the daughter, clearly. And the time of her taking in possession was equally certain, namely, when Elizabeth Thompson ceased to be the widow of the testator, whether it was effected by death or a second marriage.

A clearer example of a vested remainder could scarcely be conceived. But admitting, for argument's sake, plaintiffs in error are right upon this question, the admission is certainly fatal to their right of recovery ; for if the daughter took a contingent remainder, of necessity the widow could not have taken a fee, and their right of recovery rests entirely upon the hypothesis that she took a fee-simple title under the will.

We are, in any view, clearly of opinion that the decree of the Circuit Court was right, and it is therefore affirmed.

Decree affirmed.

NOTE BY THE REPORTER.—In *Areson v. Areson*, 3 Denio, 458, the Court of Errors held that in a will by which the testator gave to his wife "all my real estate, one clock, and the interest of five hundred dollars during her life-time," the words "during her life-time" qualified all the antecedent subjects, and the widow took only a life-estate in the lands. This was pronounced by eleven senators against ten, reversing the unanimous decision of the Supreme Court consisting of NELSON, BRONSON, and COWEN, judges. Senator Barlow said: "Punctuation determines nothing. It is true that by it sentences are assorted, and the intent is more readily presented to the eye ; or it may be it is entirely perverted and destroyed. All depends upon the intent of the writer. Intent is every thing ; and very little reliance should be placed upon the capricious rules of grammar. By travelling this road to declare and carry out the law of the land, we associate in one grand group of oracles, not only the profound jurists of former and present ages, but also the grammarians and critics of the present day, with all their learning in regard to *commas*, *semicolons*, etc.; and the strife comes up between the schools of Coke and Murray." Senator Wright said: "It may not be usual, and may perhaps be regarded as very singular, that a man should create a life estate in a clock. Yet I am not at liberty to say that this old man had not received this old time-piece from his venerable parent, and that he regarded it as a part and parcel of that inheritance which should be preserved and continued in his family until old age and use rendered it unfit for its customary resting-place behind the door, and that he was willing to confide this family relic to his widow while she survived her aged companion, and then it should again serve to tick away another generation with some other member of his family."

Brown v. Banner Coal and Oil Company.

BROWN V. BANNER COAL AND OIL COMPANY.

(97 Ill. 214.)

Deed — recording — quit-claim.

A recorded unrestricted quit-claim deed takes precedence of a prior unrecorded warranty deed of the same premises by the same grantor. (*See note, p. 109.*)

EJECTMENT. The opinion and head note show the point.

Connelley & McNeal, for appellants.

John B. Hawley, for appellee.

DICKEY, C. J. The only question we need notice in this case is, which of the two deeds made by Pollock shall prevail. Counsel for appellants insist with much force that the grantee in such a quit-claim deed as that of Pollock, made in 1865, is not a subsequent purchaser in good faith of the same thing which was conveyed by his former deed to Brown.

Were this an open question before us, the suggestions presented in their argument would be entitled to very great consideration; but the question is settled in this State by a line of authorities, which constitute a rule of property, and ought not to be disturbed by the courts.

In so far as relates to this question, our recording laws are the same now that they were in 1833. By them, all deeds conveying lands, or any interest in them, take effect "from and after the time of filing the same for record, and not before," as to all subsequent purchasers without notice; and a purchaser without notice, by such a deed of quit-claim and release, has always been held, in this State, to be such a purchaser. This same question arose in *McConnel v. Reed*, 4 Scam. 117, and this court there held that "a deed of release and quit-claim is as effectual, for the purpose of transferring title to land, as a deed of bargain and sale; and the prior recording of such deed will give it a preference over one previously executed, but which was subsequently recorded."

It is insisted, in substance, that the title having passed from Pollock by his warranty deed to Brown, the true title is excluded from the description in the second deed; that the latter deed does not

Brown v. Banner Coal and Oil Company.

profess to convey the land, or the fee-simple title to the land, but merely such title as the grantor had at that time ; and the grantor having really no title, nothing passed by the deed.

A different construction was given to such a deed in *McConnel v. Reed, supra*, and in *Butterfield v. Smith*, 11 Ill. 485. Such a deed is distinguished from a deed using these same words, with an addition, saying, “intending to convey such only as are now owned by said Walker” (the grantor) “and not any that may have been conveyed to any one else.”

The doctrine, as stated in *McConnel v. Reed, supra*, has been sustained in this court in many cases. *Kennedy v. Northup*, 15 Ill. 154 ; *Holbrook v. Dickenson*, 56 id. 497 ; *Harpham v. Little*, 59 id. 509, and other cases.

That doctrine, with its limitations, is stated in *Harpham v. Little, supra*, to be, “that a prior unrecorded deed containing the usual covenants of warranty will hold against a subsequent quit-claim deed to the same land, duly recorded, and which contains express limitations against a previous grant of the same land,” and that on the other hand the prior record of a deed of release and quit-claim will give it preference over a deed previously executed conveying the same land and subsequently recorded, “unless the intention is clearly manifested not to include” in the quit-claim deed the land mentioned “in the former deed.” The same rule is stated in *Morgan v. Clayton*, 61 Ill. 40, where it is said, “a deed of that character (release and quit-claim) will as effectually pass the title and the covenants running with the land, as a deed of bargain and sale, if the deed itself contains no words restricting its meaning.”

The quit-claim deed, under which the defendant claims title in the case at bar, contains no such restricting words ; contains no words manifesting “an intention not to include the land” mentioned in the former deed, and contains no words suggestive of a former conveyance of the same land by the grantor.

The ruling of the Circuit Court was right, and the judgment must be affirmed. *Judgment affirmed.*

Subsequently upon an application for a rehearing the following additional opinion was filed:

Per CURIAM. We are asked by petition for rehearing to reconsider the conclusion reached in this case. It is insisted that the judgment of the court in *McConnel v. Reed, supra*, does not sus-

Brown v. Banner Coal and Oil Company.

tain our judgment in this case, but is in fact adverse to the conclusion here reached, and this because a deed of release in that case was held to convey no title to the premises there sought. This position is not sustained by a careful examination of that case. The general proposition was there made that such deeds upon their face do not purport to convey title, and can convey only such title as the grantor holds as against all others; and hence, in case the title has been conveyed to another by a former deed (though unrecorded), no title could pass by the deed of release. This proposition the court in that case rejected, saying:

“A deed of release and quit-claim is as effectual for the purpose of transferring title to land as a deed of bargain and sale; and the prior recording of such deed will give it a preference over one previously executed, but which was subsequently recorded. In this respect, there is no distinction between different forms of conveyance. As a general rule, the one first recorded must prevail over one of older execution, when made in good faith, and when it appears to have been the intention of the parties to convey again the same lands which had previously been conveyed. But where the terms of the second deed do not necessarily embrace the land previously conveyed, and on the contrary are such as to show that it was not the intention of the grantor to include them, the court will give it such construction as not to embrace them,” etc.

In that case it appeared that Arnett, being the owner of a certain eighty-acre tract of land, had laid out upon it town lots, and after selling and conveying divers parts thereof to different parties (among which conveyances was the conveyance under which defendant in that case claimed), made to McConnel a deed of release of all his right and title to this eighty-acre tract. Under these circumstances the court held that it was not the intention of the parties to this deed to include such parts of the land as had before that been sold and conveyed by the grantor, holding that the use of these words in a deed of release, under those circumstances, did not embrace the lot of defendant within the description, and hence McConnel took no title.

The court, in passing upon the true construction of this deed of release upon its face, says expressly that “unexplained it would transfer all and every part of the tract of land designated, the title to which the grantor had not previously divested himself of by a valid transfer duly recorded.”

Brown v. Banner Coal and Oil Company.

It is evident that had the lot of defendant been specifically mentioned in the deed to McConnel, the ruling on this question of description would have been in favor of McConnel.

In the case at bar the land in dispute is specifically described in the quit-claim deed, and the release of "all the right, title, interest, claim or demand," which Pollock has "in and to" the land, unexplained, necessarily implies that he professed to have some right to the same, otherwise there is nothing for the release to operate upon. Not so in the conveyance to McConnel. There the land had been laid off into town lots and parts of it sold, but parts not sold; hence, as to such a deed having something to operate upon which would fill the description without including the parts previously sold, the description is referred to such parts as were unsold.

In the case at bar the deed purports to convey some right, and the whole having been before that sold, the description, if not operative upon land previously sold, has nothing to operate upon; hence the description to embrace any thing must be held to embrace the whole of the land.

The land being within the description, the grantees under this quit-claim deed are purchasers, and nothing indicating bad faith or notice of the former sale, the unrecorded deed, as against them, was inoperative until recorded, and not being recorded until after the record of the deed of release, by the very words of our statute cannot prevail.

The only debatable question in this case, in the absence of authority, relates to the question whether on its face this land is embraced in the description in the quit-claim deed. That question lay at the threshold of the case of *McConnel v. Reed*, came in judgment, and was there expressly decided. That decision has never been shaken by any decision in this State. We do not feel at liberty to depart from it, whatever might be our views were this an open question.

Neither the decisions relating to the right of recovery of the purchase-money by the purchaser from the grantor in such deeds, in case of want of title, nor the decisions relating to the inuring to the purchaser under such deed of title subsequently acquired by the grantor, have any bearing, as we conceive, upon the question under consideration.

The petition for rehearing is therefore denied.

Petition denied.

Gainey v. People.

NOTE BY THE REPORTER. — See, contra, *Rodgers v. Burchard*, 34 Tex. 441; s. c., 7 Am. Rep. 233; *Marshall v. Roberts*, 18 Minn. 405; s. c., 10 Am. Rep. 201. *Pettingill v. Devin*, 33 Iowa, 254, accords with the principal case, being founded on *McConnel v. Reed*, 5 Ill. 117, and *Ross v. Beckett*, 30 Ind. 154. The latter cites *McConnel v. Reed*.

GAINNEY V. PEOPLE.

(97 Ill. 270.)

Criminal law — trial — bailiff in jury room.

The presence of the officer, who has charge of the jury in a capital case, in their room during part of their deliberations, is not a sufficient cause for setting aside a verdict of guilty, unless it appears that the jury were improperly influenced or the rights of the accused were prejudiced thereby.

CONVICTION of murder. The opinion states the point.

Kenworthy & Beardsley, for plaintiffs in error.

E. M. Parmenter, State's attorney, for the people.

MULKEY, J. [Omitting other matters.] It is finally urged, that the verdict of the jury should have been set aside for the reason one or more of the bailiffs having charge of the jury were present during a portion of the time they were deliberating and considering of their verdict; and in support of this position, the case of *State v. Snyder*, 20 Kans. 306, and that of *People v. Knapp*, 42 Mich. 247; s. c., 36 Am. Rep. 438, are cited.

The first case is somewhat different in its facts from the one at bar. The other cannot be distinguished from the one before us. In *State v. Snyder*, the bailiff who had charge of the jury, and who was present during its deliberations, had been introduced and examined as a witness on behalf of the State, and had testified to material facts against the accused.

In such a case, it must be admitted there are reasons, of the most imperative character, which forbid the presence of the officer during the deliberations of the jury. The probable effect of his presence, under such circumstances, would be to prevent that free and independent discussion and consideration of his testimony which the ends of justice demand and the obligations of the jurors impose.

And in any event, by reason of his official position and supposed superior knowledge with respect to the questions in controversy, his presence would necessarily incline the more timid and inexperienced jurors to refrain from the expression of any views they might have on the subject of their verdict.

In the case at bar, while it is true one of the bailiffs, who was present during a portion of the time the jury were considering of their verdict, was examined as a witness, yet it was only with reference to the plat of the town — a matter about which there was no controversy, and consequently a matter that could have provoked no discussion before the jury.

In addition to this, it is shown, affirmatively, in this case, that nothing was said or done, by either of the bailiffs who waited on the jury, to influence or control their deliberations.

The case of *People v. Knapp* is placed upon the broad ground, that the presence of an officer during the deliberations of the jury, is such an irregularity and invasion of the right of a trial by a jury as to absolutely vitiate the verdict in all cases, without regard to whether any improper influences were actually exerted over the jury or not. While we feel and frankly acknowledge the force of the reasoning by which this conclusion is reached, we are unable to fully give it our sanction.

So far as the cases cited hold that it is improper for an officer of the court, or any one else not a jurymen, and especially one who has been examined as a witness in the cause, upon controverted facts, to be present while the jury is deliberating upon the subject of their verdict, we give them our hearty approval. But we are unable to go to the length of saying, that if an impropriety of the kind, for any cause, happens to be committed, the verdict is thereby, in every case, necessarily vitiated, without regard to the conduct or motives of the officer or the effects of his presence upon the jury.

We prefer saying such a breach of duty on the part of the officer is a grave irregularity, which will or will not have the effect of vitiating the verdict, depending upon the circumstances in each particular case. Like most questions of that kind, which often arise in the course of a trial, we are of opinion it may be safely intrusted to the discretion of the court who tries the cause, and this court would not feel at liberty to interpose, except where it can see there has probably been an abuse of that discretion.

Where, in a case of this kind, it affirmatively appears that the

Dodge v. Cole.

officer was not influenced by improper motives, and that his conduct, outside of the mere fact of being in the presence of the jury, was unexceptionable, and the court is unable to discover, after due inquiry, any thing connected with the transaction from which it might reasonably be inferred the jury were improperly influenced, or the rights of the accused prejudiced, we can see no sufficient reason for setting the verdict aside, thereby incurring the expense, trouble and delay of another trial.

On the other hand, when the inquiry develops any fact or circumstance which tends to show that the accused may have been prejudiced by the irregularity, the verdict should be set aside, and it would be error not to do so.

In this case, we are unable to discover any thing of that kind, and must therefore presume that the court below properly exercised the discretion with which the law has clothed it, in cases of this character,

Believing that substantial justice has been done, and perceiving no material error in the proceedings of the court below, the judgment of that court will be affirmed.

Judgment affirmed.

DODGE V. COLE.

(97 Ill. 338.)

Jurisdiction — lunatic's real estate — inherent power of court to order sale.

A court of equity has inherent power to order a sale of a lunatic's real estate.

BILL to set aside a sale of land by a former conservator of a lunatic. The opinion states the case. The bill was dismissed below.

H. B. Hopkins and Enoch P. Sloan, for appellant.

D. McCulloch and R. G. Ingersoll, for appellees.

MULKBY, J. [Omitting minor matters.] It is further claimed, that at the time of the rendition of the decree by the Circuit Court of Peoria county authorizing a sale of the land, there was no law in

existence in this State conferring upon Circuit Courts power to order a sale of the land of an idiot or insane person. If this position be true, it necessarily follows the whole proceedings in that court, and the sale under it by the conservator, were a nullity, and all persons claiming title through such proceedings and sale are chargeable with notice of that fact, for every one is conclusively presumed to know, when purchasing an estate, the legal effect of every judgment or decree through which he derails title.

It is conceded that at the time of these proceedings there was no statute which in terms authorized courts of chancery to entertain applications for the sale of real estate belonging to an idiot or insane person. The statute then in force gave the conservator "the entire care of the estate," "both real and personal," of an "idiot, lunatic, or distracted person," and authorized him to sue and be sued in his capacity of conservator, and also provided that executions issued against him as conservator might be levied upon any property in his possession, whether real or personal, belonging to his ward, not exempt from execution, and that the same might be sold as in any other cases. It also authorized him to sell and dispose of the personal estate of his ward without any order of the court for that purpose, but no such power was conferred upon him with respect to the real estate. The act also provided that the conservator should be allowed reasonable compensation for his services, yet it was silent as to how he was to be paid where the estate of his ward consisted solely, as in this case of unproductive real estate. Revised Laws of 1833, p. 332.

The statute in force at that time in relation to the poor of the county, like our present statute, made no provision for any one who had property of his own. So, if the position of the appellant is correct, it follows that an idiot or insane person at that time, if his conservator were unable to obtain credit, might, with an unproductive estate in lands worth \$100,000 or more have starved to death, while neither the State nor his relations would have been under any obligations to provide for him, simply because there was no power in the courts to order a sale of his lands. If such was the law at the time of those proceedings, it must be confessed it was extremely defective, and it is difficult to conceive how a court, whose jurisdiction is founded mainly upon necessity and the general principle that it will afford relief where there is no adequate remedy at law, would be impotent to afford relief under such cir-

Dodge v. Cole.

circumstances. We cannot yield our assent to this view of the matter.

The legislature, in providing the conservator should have reasonable compensation for his services, must have intended the appropriate courts should be open to him where it could not be otherwise enforced. Other creditors, where there was no personal estate, were authorized, under the provisions of the statute, to go into a court of law, obtain judgments against the conservator, sue out executions, and cause the real estate of the ward in the conservator's possession to be sold in satisfaction of their judgments. But the statute afforded him no such remedy. He could not, of course, sue himself, as conservator, nor could he sue his ward in a court of law; so, in such case, all creditors would have a remedy except the conservator, unless he were permitted to go into a court of equity for relief, and the only relief that courts could afford would be to order a sale of so much of the land as would be necessary to pay his demand.

The law, upon the appointment of the conservator, confers upon him certain powers, and imposes certain duties, which the statute, in express terms, denominates a trust. The relation of trustee and *cestui que trust* is at once created between him and his ward. The estate of the latter becomes a trust fund for his own support and that of his family, if he has one, and like any other trust fund, it is subject to the control and direction of a court of equity.

The argument by which the conclusion is reached, that a court of chancery had no power to order the sale in question, is in general terms, as we understand it, substantially this: That by the common law of England, as it existed prior to the fourth year of the reign of James the First, the power and control over the persons and property of lunatics and idiots belonged to the king, as *parens patriæ*, and were exercised by him through the lord chancellor. That although this jurisdiction was exercised by the lord chancellor in the High Court of Chancery, yet it was not exercised by him in his character of chancellor, or by virtue of the general powers pertaining to that court, but on the contrary, by virtue of a separate and distinct commission under the sign manual from the Crown. That upon the organization of our State government the State, as a political sovereignty, in its character of *parens patriæ*, succeeded to all the rights and duties previously enjoyed or exercised by the Crown of England with respect to idiots and luna-

tics and their estates. That the power to which the State thus succeeded is not of a judicial character, wherefore, in the distribution of the powers of government under the Constitution, it was not thereby delegated to or conferred upon the judicial department of government, and hence, without express legislation, a court of chancery was not authorized to exercise it. That this view has much force in it cannot be denied.

It is conceded that the power exercised by the lord chancellor of England over the persons and estates of lunatics and idiots was, in early times, when the jurisdiction of the High Court of Chancery was very limited, conferred upon him by special grant from the crown, and was not, except perhaps to a limited extent, referable to the general powers exercised by him in his character of chancellor. We also understand, that in theory of law, the State, in its character of *parens patriæ*, may rightfully exercise the same power and control over the persons and property of lunatics and idiots, that was exercised by the Crown of England through the lord chancellor, at the period referred to. We further understand, that under the constitution of 1818, and the statutes in force at the time of the sale in question, the Circuit Courts of this State possessed original jurisdiction in all matters * * * in chancery, as the same had been previously exercised and understood in the courts of this country and England, having general chancery powers, and that they possessed no other or further powers or jurisdiction.

And it must also be confessed, that the decided weight of authority establishes the proposition, that a court of chancery has no inherent power to decree a sale of lands belonging to lunatics, idiots, infants, or others laboring under disabilities.

Leaving out of view the effect of the statute relating to idiots and insane persons, already alluded to, it follows that if the sale in question can be sustained at all, it must be upon general and fundamental principles which have not heretofore received full recognition by courts of equity in determining the power to order such sales, and this will lead us to consider, briefly, the general features of our State government, so far as they may be supposed to have any bearing upon this question.

All political powers which the State may rightfully exercise at all belong, ultimately, to the people, in their sovereign corporate capacity, which they may distribute for purposes of government.

Dodge v. Cole.

in such manner as they think best, subject to the limitation, that when the State government is organized it shall be republican in form. These powers of government are, in their very nature, either legislative or executive. Every legitimate exercise of political power, of necessity, consists in the making or execution of some law. The executive powers are, in their nature, either judicial or ministerial ; hence, for convenience of administration, the powers of government are, by the Constitution of this State, and that of all the others, so far as we are advised, divided into three classes, namely: legislative, executive and judicial; and by this division are conferred respectively upon three distinct branches of the government, and this being a complete disposition of the whole, it follows, neither branch of government to whom these powers have been thus delegated can exercise any of those conferred upon either of the others. While each department is, in theory, independent of the others, and must therefore in the first instance judge of its own powers within the grant, yet whenever any property right is drawn in question, in a legal proceeding depending upon an alleged usurpation of power by either of the other departments, and not with respect to a matter of which such department is made the exclusive judge, the ultimate power of determining the question belongs to the judiciary. It is the right of the legislature to pass general laws for the government and regulation of all persons and property within the State, and it is made the exclusive judge of their fitness and propriety, so long as they do not encroach upon the powers intrusted to the other departments of the government, or interfere with vested rights.

The legislature has the power, should it deem it expedient, to repeal all laws not embodied in the Constitution, except such as are essential to the enforcement of vested rights, and subject to the same limitation, it may change the forms of action and modes of procedure in courts of justice to whatever extent it may see fit.

The judicial powers of the State are exercised by courts established under the Constitution, in conformity with the usage and principles of the common law, or in the manner prescribed by the legislature.

When set in motion by the institution of suits for the settlement of difficulties, it is the province of courts to declare what the law is, and apply it to the controversies before them. They have no power to make law. That is a legislative function, which must be exer-

cised exclusively by the legislative branch of the government. They are only permitted to declare what the law is, and apply it to existing controversies, when brought before them by some appropriate proceeding.

These general propositions are plain, simple and well understood by all who have even a limited knowledge of the organic law of the State.

Nevertheless, when we come to apply them to actual controversies, growing out of the varied relations which the citizens sustain to the State and to one another, we encounter doubts and difficulties of the gravest character.

Just where the dividing line is to be drawn between judicial and legislative power, with respect to certain subjects, often presents questions about which enlightened courts and eminent jurists widely differ.

So while the powers of courts seem so very simple and clearly defined, yet in the application of them to actual cases their proper limits are often difficult to determine. And the difficulty in this respect is not a little enhanced by the fact, the same Constitution by which the distribution of the powers of government is made provides for a specific class of courts by name, which have from time immemorial had a definite mode of procedure, and exercised many powers which if determined by the constitutional test, as founded on the simple distribution of the powers of government, could hardly be regarded as strictly judicial, and it is reasonable to suppose that the people in providing through the organic law of the State for these courts intended to establish them with all the powers which had theretofore been exercised by those courts. As an illustration, where the legislature has not otherwise provided, all courts of record and of general jurisdiction may prescribe such reasonable rules as may be necessary for the efficient transaction of their business, and parties litigant and counsel are bound by them. Nevertheless, the power thus exercised in the adopting of such rules is clearly in its nature legislative, and not judicial. Moreover, much that is done by the judges who preside over these courts is purely of a ministerial character, yet absolutely essential to the transaction of the business of the courts. So, much of their procedure and many of their powers are of common-law origin. On this principle courts without any legislation for that purpose are understood to have an inherent power to cause to be brought before

Dodge v. Cole.

them and punished all persons who unlawfully obstruct their process during term time.

The very act of establishing a court by implication confers upon it such powers, not expressly given, as are necessary to the efficient transaction of all such business as it is by law authorized to perform.

The primary object of every enlightened government is the protection of the persons and property of its citizens, and of all the agencies usually provided for the accomplishment of this object the courts are confessedly the most efficient.

The State, upon its organization, assumes the duty of providing for the peace, health, security and common welfare of all who owe it allegiance, and it especially undertakes to provide for and protect those who are in fact or in contemplation of law unable to take care of themselves, and this is accomplished to a large degree through its courts. Through their coercive powers property is protected from the assaults of force, fraud and dishonesty, and through their administration is made to supply the wants and relieve the necessities of the weak and helpless, and to accomplish these ends is the primary object in establishing them. Courts of chancery deal with property rights almost exclusively.

Indeed, it has been said by high authority that they are powerless to act in any case where the rights of property are not in some manner involved, though this is denied by others. However this may be, it is undeniable that the business of courts of equity is almost, if not entirely, confined to adjusting difficulties and controversies with respect to property, and to administering it for the benefit of those who are not permitted by the law, or have not mind sufficient, to act for themselves.

In short, courts of equity have to deal with, declare and enforce property rights. They have no power to create them. Their business is simply to declare and enforce them as they find them, through the modes of procedure which the law has provided. Every right to be thus declared and enforced by a court of equity springs from the law by reason of the existence of some fact or facts, or combination of facts. Therefore, in every suit of the kind, it is the duty of the court, where it is denied, to ascertain in the first place whether the fact or combination of facts upon which the right depends exists; and in the second place, to determine whether the law, as applicable to the facts found, gives the right claimed;

and the performance of these duties, on the part of the court, is the exercise of judicial power.

Now, inasmuch as the primary object of all property rights is to provide the owner with means to relieve his wants and necessities, and to administer to his comfort, convenience and well-being, the law wisely gives to every adult person, not laboring under disabilities, the unlimited right to dispose of whatever belongs to him in such manner and for such purposes as he may deem most conducive to the object in question, and there is no difference, in this respect, between personal and real estate. And inasmuch as infants are presumed by law to be incapable of contracting, and therefore are not permitted to sell or otherwise dispose of their estates, except to a limited extent, courts of equity have from time immemorial, upon proper application, assumed jurisdiction over their persons, their personal estate, and the rents and profits of their lands, and applied the same to their support and education, and this without any special statute authorizing them to do so. And in the same manner the lord chancellor in England, as we have already seen, by virtue of a special commission from the Crown, applied the personal estate and the profits of the real estate of lunatics and idiots to their support and maintenance. Upon what principle may it be said then that a court of equity has an inherent right to order a sale of the personal estate of an infant for his support, and yet have no such inherent power to dispose of his lands for the same purpose? It is not a sufficient answer to say, because one is personal property and the other is real property. The right to own property at all, as we have just seen, implies the right to have it applied to one's support, and there is no difference in this respect between land and personal estate, or whether the owner is an infant or an idiot or an adult free from disabilities.

Inasmuch as the jurisdiction of courts of equity, in disposing of the personal estate of infants for their support, does not depend upon any statutory provisions, but upon general principles, it is important to ascertain as definitely as we can the true reasons upon which the jurisdiction rests, and also to discover, if possible, the grounds upon which they have hitherto declined to assume jurisdiction, when the application has been to sell realty for the same purpose.

So far as this country is concerned, the mere difference between the two kinds of property cannot reasonably be regarded as an ele-

Dodge v. Cole.

ment in the question. It is believed the true and only rational grounds upon which the jurisdiction rests, are: 1. The duty of the State to protect and provide for such of its citizens as are incapable of taking care of themselves. 2. The right of every owner of property to have it applied to his support. 3. The absolute necessity for such relief. 4. Such applications involve the exercise of judicial power. 5. The duty which the State owes to those laboring under disabilities can be more appropriately and efficiently performed through courts of equity than in any other way.

Since all of these reasons apply with equal force to applications for the sale of real property, the natural inquiry arises, why is it held the jurisdiction does not extend to real property? Doubtless, for two reasons:

1. The jurisdiction originated in England, at a time when it was contrary to the settled policy of that country to interrupt the course of descents to real property. The law of primogeniture was then in full vigor, and was regarded with great favor by the courts, and of course every severance of an estate necessarily interrupted the course of descent, and was justly regarded as antagonistic to the much cherished right of primogeniture. It was the pride of the English people to keep their large and valuable landed estates intact, so that they might descend from generation to generation in the same family. Moreover, the lands there were almost universally productive, so that the income, as a general rule, was all that was necessary for the support of those laboring under disabilities, hence there was no necessity for the sale of the realty. The policy of this country is the very reverse of that which gave rise to the rule in England. With us it has been the settled policy to keep our lands unfettered by entailments, and to encourage, as far as possible, their free and untrammelled transfer from one to another.

2. The recognition, in this country, of the rule which permits courts of chancery to order a sale of the personal estate, but not of the realty, of persons laboring under disabilities, is attributable solely to the great veneration in which previous decisions are held by the courts. As a general rule, a court follows the old beaten track of precedents, without ever stopping to inquire into the reasons upon which they rest, until it discovers that to follow it in some particular case will result in great hardship or manifest injustice, when, for the first time, it feels itself bound to reconsider the reasons upon which the precedents it has hitherto followed rest, and upon

such reconsideration it may find that the grounds upon which the original case was decided are not sound, and that all the subsequent cases have simply followed it without examining the reasons upon which it rests, or it may turn out that the reasons upon which the original case was decided have ceased to exist. In either of the cases supposed, where the case has not become a rule of property, the court should disregard the precedents, and announce such a rule as is consonant with reason and justice.

The value of every case as a precedent, which is not founded upon some statutory provision and has not become a rule of property, depends entirely upon the reasons which support it. If it is founded upon a misapprehension of facts, or is supported by false logic, or the reasons upon which it rests have ceased to exist, and the case has not become a rule of property, it should be disapproved, and no longer be recognized as authoritative.

On the other hand, where a question has once been solemnly decided by a respectable court of last resort, the decisions of such court should, unless some of the reasons we have mentioned, or others equally good, affirmatively appear to the contrary, be accepted as the best evidence as to what the law is on that question, and courts should give it effect accordingly, or in other words, should adhere to the principle of *stare decisis*.

The general rule unquestionably is, all cases falling within the same principle, however much they may differ in their facts as to unimportant matters, should be decided in the same way. In our judgment, in this country, where it is the settled policy, as we have seen, to encourage the free transfer of real property to the same extent as that of personal estate, there is no more reason for holding that a court of equity has an inherent power to order the sale of the one and not the other, than there would be to attempt to found a distinction with respect to the power of the court to order a sale on the difference between a flock of sheep and a herd of cattle.

If courts of equity have the power, without legislation, to order the sale of the one, they have power to order the sale of the other, and since there is no question as to their power, with respect to the sale of the personal estate of an infant, we hold, for the reasons already stated, they may, in like manner, direct the sale of the real estate of an infant, lunatic, or idiot, whenever necessary for his support. All the reasons which we have mentioned as the grounds of the jurisdiction of a court of equity to order a sale of the per-

Dodge v. Cole.

sonal estate of an infant, apply with more force, if possible, to the case of a lunatic or idiot.

An inquiry, for the purpose of determining whether there is a necessity for converting the real estate of a lunatic into money for his support in a particular case, is clearly the exercise of judicial power, and since the primary object of all property rights is to provide the owner with means to relieve his wants and necessities, and since every such owner therefore has the right to have his property applied for these purposes, and inasmuch as lunatics are unable to do this for themselves, and it is the peculiar province of courts of equity to enforce existing rights, when the law affords no adequate remedy, as it certainly does not in cases of this character, it is not perceived, on principle, why courts of equity may not well assume jurisdiction in such cases; and it is hardly a sufficient answer to say the precedents are the other way, if well established principles sanction the jurisdiction.

It is conceded that if there was not an existing right in the lunatic to have his property applied for his support, then a court of equity would have no power or authority to interpose, for to do so would be an invasion of the rights of the legislature, or in other words, it would be simply judicial legislation.

At the time of the application for an order for the sale of the land in controversy, there was no lord chancellor commissioned by the State with the power to provide for the wants and necessities of all lunatics and idiots within the State, nor was there any other tribunal, save a court of equity, authorized to act in the premises.

Moreover, it must be borne in mind, that when this diversity in the jurisdiction exercised over infants and persons of unsound mind first obtained, courts of chancery were then in their infancy, and the principles upon which they acted were not so well defined and understood as they are now. At that time, their jurisdiction was confined in very narrow limits and was extended to comparatively but few subjects, and to hold that all matters over which they did not then assume jurisdiction is a sufficient reason for withholding equitable relief at the present time would be to deprive courts of equity of the greater portion of their jurisdiction. This we are not prepared to do. All who are conversant with the history of equity jurisprudence know that as a distinct system, it has been of constant growth and development from its inception to the

present time, covering a period of hundreds of years. The jurisdiction of a court of equity does not depend upon the mere accident whether the court has, in some previous case or at some distant period of time, granted relief under similar circumstances, but rather upon the necessities of mankind, and the great principles of natural justice, which are recognized by the courts as a part of the law of the land, and which are applicable alike to all conditions of society, all ages, and all people. Precedents are useful as evidences of what the law is, and serve as guides in the application of those principles. Where it is clear the circumstances of the case in hand require an application of these principles, the fact that no precedent can be found in which relief has been granted under a similar state of facts is no reason for refusing it. *Curtis v. Brown*, 29 Ill. 201; *Voris v. Sloan*, 68 id. 588.

It is not true however in point of fact, that courts of equity have never exercised jurisdiction over the persons and estates of lunatics and idiots: *Ex parte Salisbury*, 3 Johns. Ch. 347.

It is further claimed by appellant, that the proceeding by the conservator to sell the land was adverse to his ward, and therefore the ward should have been made a party, and that not having been done, the court was without jurisdiction to render any decree in the case. We do not regard the proceeding as adverse to the ward, but on the contrary, for her benefit.

The petition prayed for a sale of the premises for the payment of existing indebtedness on account of her support and for her future maintenance, and so far as its object was to provide means for her future support, it was clearly for her benefit, and it was not therefore necessary to make her a party.

The allegations in the petition were sufficient to give the court jurisdiction, and the decree must therefore be regarded as binding in all collateral proceedings, and its effect in this respect cannot be changed, even admitting the proceeds of the sale were applied to an improper purpose, which we do not wish to be understood as at all intimating was done. This substantially disposes of the main objections against the validity of the decree, and sale by the conservator, and the conclusion reached, of course, renders it unnecessary to consider other questions which have been argued by counsel.

For the reason stated, we are of opinion the decree of the Circuit Court should be affirmed, and it is therefore so ordered.

Decree affirmed.

POWELL V. BOARD OF EDUCATION.

(97 Ill. 376.)

Schools — common — modern languages taught in.

Under the provision of the school law allowing instruction in "such other branches, including vocal music and drawing," as may be prescribed by the directors or voters, any modern language may be taught. (*See note, p. 129.*)

BILL to enjoin a misappropriation of school funds. The opinion states the case.

Wilderman & Hamill, and R. A. Halbert and J. M. Dill, for appellants.

G. & G. A. Kærner, for appellees.

SCOTT, J. We have given this case that full and careful consideration its importance demands, and find that our views on the questions raised may be stated without any very elaborate discussion. The bill was brought by a number of tax payers, against the board of education of the school district in which they reside and in which their property is situated, to enjoin what they allege is a misappropriation of the school funds of the district.

The principal allegations of the bill upon which is based the right of relief are :

First. That complainants are advised, as a matter of law, the board of education has no power to prescribe any studies, in common schools established in such district, other than the branches of education prescribed in the qualifications for teachers, viz: orthography, reading in English, penmanship, arithmetic, English grammar, modern geography, the elements of the natural sciences, history of the United States, physiology and the laws of health, and such other branches of an English education, including vocal music and drawing, as the board of education, or the voters of the district at the annual election of directors, may prescribe. And—

Second. That the board of education, without power or authority of law, as complainants are advised, are using the common schools of the district for instruction in the branches of a German education, and have employed teachers to teach, and who are teaching in such

schools German orthography, German reading, German penmanship and German grammar, and are misappropriating and diverting the common-school funds and the funds derived from complainants and other tax payers in the district for the support of common schools in such district, to the teaching of such German branches.

It is admitted by defendants, that the German language is one of the branches taught in the schools of the district under their direction, but it is denied it is done without authority of law, or that it is any misappropriation of the common-school funds.

It is also set up in the answer, the teaching of the German language in the schools of the district does not increase the expenses of the district one dollar; that the same number of teachers now employed would necessarily be employed whether the German language is taught or not; that instructions in the English branches are not allowed to suffer on account of teaching German; that at an election for members of the board of education, held in April, 1878, the question of teaching the German language as it is now taught was made an issue at the polls, and such question was decided by a majority of over two hundred votes in favor of teaching such language in the schools of the district, and that the German language has been taught in the schools of the district, without objection, for more than fifteen years.

Answers to specific interrogatories propounded in the bill disclose a few facts it may be well to state, in order to a clear understanding of the case in all its bearings. According to reports of teachers, the number of pupils participating in German instruction is from 80 to 90 per cent of the pupils enrolled for the years covered by this controversy. All pupils receive instructions in the English branches taught in the schools. Participation in the German instruction is optional with the parents of the pupils. All teachers giving instruction in German teach English branches in their respective classes. The time occupied in giving instruction in German, in the first or lowest grade, is thirty minutes, and in all other classes it is one hour per day. On the hearing in the Circuit Court, the bill was dismissed, and that decree was affirmed in the Appellate Court. As the case was submitted on bill and answer, the facts alleged in the answer will be taken as true.

But one question arises on the record, as the case comes before this court, and that is whether the board of education, under existing laws, have any rightful authority to allow the teaching of the

Powell v. Board of Education.

German language as one of the branches to be taught in the schools of the district.

Section 1, article 8, of our present Constitution declares : "The general assembly shall provide a thorough and efficient system of free schools, whereby all the children of the State may receive a good common-school education." This section of the Constitution is mandatory, and at the same time, it is a limitation upon the power of the general assembly. So far as it makes it the duty of the legislature to establish "a thorough and efficient system of free schools," it is mandatory. But the latter clause of the section is a limitation upon the power of the legislature as to the character of education to be afforded by the system of free schools to be established and maintained. It is not a grant of power, as was said in *Richards v. Raymond*, 92 Ill. 612, for the general assembly needed no grant of power to enable it to enact any laws that might be deemed necessary to advance the welfare of the people of the State. It is apprehended, if it were not for the limitations contained in the section cited, and also in the third section of the same article of the Constitution, the legislature might enact any law deemed most beneficial to the people of the State, on the subject of schools and general education. But those sections fix limits in two particulars beyond which the legislature may not go, and of course all inhibited legislation on the subject of education would be void.

Observing the constitutional restriction, the general assembly can only establish a "system of free schools" that will afford "a good common-school education." But what is "a common-school education?" As the Constitution is silent on the subject, it is evidently left to the wisdom of the general assembly to declare what would constitute such an education. No doubt that body would be bound to conform to the popular understanding of what constitutes "a common-school education." Without being able to give any accurate definition of a "common school," it is safe to say the common understanding is, it is a school that begins with the rudimental elements of an education, whatever else it may embrace, as contradistinguished from academies or universities devoted exclusively to teaching advanced pupils in the classics, and in all the higher branches of study usually included in the curriculum of the colleges.

The act of 1872, which is the last revision of the School Law, enacts that every school established under its provisions "shall be

for the instruction in the branches of education prescribed in the qualifications for teachers, and in such other branches, including vocal music and drawing, as the directors, or the voters of the district, at the annual election of directors, may prescribe." The qualifications of teachers of the first grade, as prescribed by the act, shall be to "teach orthography, reading in English, penmanship, arithmetic, English grammar, modern geography, the elements of the natural sciences, the history of the United States, physiology and the laws of health," and of the second grade, shall be to teach "orthography, reading in English, penmanship, arithmetic, English grammar, modern geography, and the history of the United States."

The difficulty in the case lies in ascertaining what studies the board of education may prescribe for the schools of the district, under the phrase "such other branches." As the branches teachers shall be qualified to teach are specifically mentioned, the argument insisted upon in support of the bill is, the branches enumerated are the kind of branches, and the language in which they are expressed in the statute is the kind of language, the legislature had in mind when it used the general terms, "and in such other branches." We will be assisted to a clearer understanding of what the general assembly may have intended to be understood by the use of the words, "such other branches," in connection with the studies prescribed for the schools, by a brief review of the legislation concerning public schools. It may be well to observe,—first, the legislature, from its earliest action on the subject of schools, seems to have used the words "free schools," and "common schools," interchangeably, sometimes using one phrase and at other times using the other, as meaning the same thing; and, second, that the words, "English education," found in the bill, do not exist in the present statute. In the revision of 1872 of the School Law, the expression, "English education," was omitted. Notwithstanding the omission of the words, "English education," from the statute, it must be conceded the education to be afforded to the children of the State by the system of free schools the general assembly is required to establish, is what is popularly understood to be an "English education." But what is an "English education?" The sciences are taught in the languages of all civilized peoples. Mathematics, geography, geology, and other sciences taught in the schools are no more a part of an English education than they are of a German

education. An education acquired through the medium of the English language is an English education ; but if the same branches were taught in the German language it would be a German education. It is therefore the language employed as a medium of instruction that gives distinctive character to the education, whether English, German or French, and not the particular branches of learning studied. This accords with the legislative description, as, in the act of 1847, of schools entitled to support from public funds, that they shall be English schools,—that is, schools “in which the medium of instruction was the English language.” Keeping these definitions in view, we may be better prepared to understand the legislation concerning schools, and may, possibly, discern the legislative intention as to what studies should be prescribed for the common schools of the State.

[Omitting a review of legislation.]

This summary of the legislation respecting common or free schools makes apparent the class or description of schools to be maintained out of the public school fund, no matter from what source the same may be derived. It is manifest such schools shall be what are popularly known as “English schools,”—that is, the medium of instruction in all schools established or to be established under existing laws shall be the English language, but there has been no intention expressed, in any legislation respecting schools, to inhibit the teaching of modern languages in such schools. On the contrary, the legislation, for more than a third of a century back of the act of 1872, by affirmative expressions, allowed it. It would be an unreasonable construction, that because the act of 1872 is silent upon the question of teaching modern languages in common schools, it is therefore a restriction on that policy that had grown up under former legislation, and had been so generally acted upon throughout the State. Had such been the intention of the general assembly, it would no doubt have used apt words to express that intention. The absence of any affirmative expressions abrogating the former policy in respect to teaching modern languages in common schools is persuasive, at least, that that policy was not to be changed.

Under this view of the law, there can be no valid objection to teaching German or other modern language as a branch of study in common schools, “as the directors, or the voters of the district at the annual election of directors, may prescribe,” where the medium of instruction in such schools is the English language.

Directors are invested by law with large discretion in all matters pertaining to the management of schools. With the discretionary powers of officers, whether executive or judicial, courts have no rightful authority to interfere unless where there has been such abuse of their discretion as works palpable injustice or injury.

Section 48 of the School Law makes school directors of each district a body politic and corporate, and gives them power to "direct what branches of study shall be taught and what text-books and apparatus shall be used in the several schools."

Construing this clause of the statute in *McCormick v. Burt*, 95 Ill. 263; s. c., 35 Am. Rep. 163, it was said: "In the performance of the duties imposed by law upon school directors, they must exercise judgment and discretion. What rules and regulations will best promote the interests of the school under their immediate control, and what branches shall be taught, and what text-books shall be used, are matters left to the determination of the directors, and must be settled by them from the best lights they can obtain from any source, keeping always in view the highest good of the whole school."

Power is expressly given to directors to order that "other branches" than those enumerated may be taught in the common schools, and by another section, they are given discretion to say what those branches of study shall be. The limitation upon this power arises out of the Constitution itself; and is, that such schools shall be distinctively English schools, in which the medium of instruction is the English language, and that such schools shall be what are popularly understood to be "common schools," as contradistinguished from colleges and universities. This view of the law finds sanction in the reasoning in *Richards v. Raymond*, 92 Ill. 612.

In *Stuart v. School Directors*, 30 Mich. 69, questions analogous with those involved in this decision were discussed, and much of the reasoning in the opinion is valuable as aiding us in the construction we have given to our own statute.

[Omitting a minor consideration.]

We may take judicial notice of what is generally known,—that the German and other modern languages have been taught in the common schools in many localities in the State. For many years modern languages have constituted "other branches" of study in the common schools, and the legislature has not seen fit to forbid the course adopted. The teaching of modern languages in our

 Union Mutual Life Insurance Co. v. Frear Stone Manufacturing Co.

common schools has been too long acquiesced in to be now changed except by legislative action, if done at all. It ought not to be done by judicial construction.

This bill makes no case that will warrant equitable relief. It is admitted the German language is one of the branches taught in the schools of the district by the direction of the board of education, but that is allowable under the School Law, as the same has been construed. Nothing contained in the bill shows the school is not an English school, in which the common medium of instruction is the English language. The mere fact, the German language is one of the branches of study prescribed, does not change its character as an English school.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

WALKER, J., dissenting.

NOTE BY THE REPORTER.—Similar doctrine was held in *Stuart v. School District*, 30 Mich. 69, where COOLEY, J., said: "When this doctrine was broached to us, we must confess to no little surprise that the legislation and policy of our State were appealed to against the right of the State to furnish a liberal education to the youth of the State in schools brought within the reach of all classes. We supposed it had always been understood in this State that education, not merely in the rudiments, but in an enlarged sense, was regarded as an important practical advantage to be supplied at their option to rich and poor alike, and not as something pertaining merely to culture and accomplishment to be brought as such within the reach of those whose accumulated wealth enabled them to pay for it." And he concludes: "Neither in our State policy, in our Constitution, nor in our laws, do we find the primary school districts restricted in the branches of knowledge which their officers may cause to be taught, or the grade of instruction that may be given, if their voters consent in regular form to bear the expense and raise the taxes for the purpose."

 UNION MUTUAL LIFE INSURANCE COMPANY V. FREAR STONE
MANUFACTURING COMPANY.

(97 ILL. 537.)

Corporation — liability of stockholders — attempt to evade.

A private corporation, the stockholders of which were not individually responsible for its debts increased its stock under authority of its charter, and subscriptions to such new stock were made upon the agreement, set forth in the subscription paper, that no assessment should be made, and that each subscriber was to pay only \$10 per share for such new stock, the par value of which was \$100 per share. *Held*, that this provision was void as against creditors of the corporation without notice of it, and that such creditors could enforce payment for such stock to the extent of their demands.

Union Mutual Life Insurance Co. v. Frear Stone Manufacturing Co.

CREDITOR'S bill. The opinion states the case.

McClellan, Tewksbury & Cummins, for appellant.

Joseph E. Smith, William B. Gibbs, and Dexter, Herrick & Allen, for appellees.

SCOTT, J. The bill in this case was brought by the Union Mutual Life Insurance Company, a corporation existing under the laws of the State of Maine, against the Frear Stone Manufacturing Company, a corporation existing under the laws of the State of Illinois, and the stockholders in the last mentioned company. It is a creditor's bill, and the facts necessary to an understanding of the question of law raised and discussed may be readily stated, as most of them appear by admission on demurrer.

An act of the general assembly of the State of Illinois, approved February 23, 1867, created a corporation styled the Northwestern Manufacturing Company. Section 2, of the charter, provided the capital stock of the company should be \$200,000, and might be increased by resolution of the board of directors to any amount not exceeding \$1,000,000, and should be divided into shares of \$100 each. The corporation was duly organized, under the charter, in 1867, and afterward, under the provisions of section 2 of the charter, the capital stock of the company was increased, by a resolution of the board of directors, to \$300,000. The shares were fixed at \$100 each. The company thus organized commenced, as it was authorized to do, the manufacture of artificial stone, under the "Frear patent."

In 1868, a number of persons, named as defendants in the bill, became subscribers to the capital stock of the Northwestern Manufacturing Company, under an agreement, of which, omitting the date and signatures thereto, the following is a copy, viz.: "We the undersigned, subscribers to the capital stock of the Northwestern Manufacturing Company, of Chicago, do hereby subscribe for, and agree to take, the number of shares of \$100 each, in the stock of said company, set opposite our names, and pay for the same according to the terms following, and as follows, to wit:

"1st. The stock of the company shall be and remain as it now is, at \$300,000, in shares of \$100 each.

"2d. The business of the company shall be the manufacture

Union Mutual Life Insurance Co. v. Frear Stone Manufacturing Co.

and sale of Frear's patent artificial stone, stucco, mastic, cement, etc., and the sale or disposal of the patent right to parties in other parts of the State of Illinois.

"3d. No assessment shall ever be made upon the stock of the company.

"4th. The said company are to pay the present owners of the patent right, above mentioned, \$125,000 for such exclusive right in and to the State of Illinois.

"5th. We agree to pay ten dollars upon each share of stock subscribed by us, which is the sum total we shall be held liable to pay.

"6th. Fifteen thousand dollars of the proceeds of the sale of stock, as above, shall go the company and be used as further working capital, in carrying on the manufacture.

"7th. Fifteen thousand dollars in cash shall be paid the present owners for the manufactory and contents on hand for work, including stock on hand, which shall go to the credit of the company in part payment for this patent right, leaving due the present owners of the patent right the sum of \$110,000, which shall be paid out of the first earnings of the company, or the disposal of patent rights in other parts of the State."

The total number of shares which the subscribers to the agreement obligated themselves to take, was two thousand five hundred and eighty-five, of the value of \$100 each, representing a total value of stock of \$258,500. Persons not subscribers to the agreement, took other shares. Certificates of stock were issued to, and accepted by, the subscribers to the agreement. On the 9th day of March, 1869, by an act of the general assembly, the name of the corporation was changed to "The Frear Stone Manufacturing Company," under which name it continued until it ceased to do business, in January, 1874. On the 8th day of December, 1870, the Union Mutual Life Insurance Company loaned the defendant corporation the sum of \$50,000, which indebtedness was evidenced by a promissory note payable five years after date, with interest, at the rate of eight per cent per annum, and was secured by trust deed on certain real estate owned by the company. The interest was paid on this note until 1872, when default was made. After the maturity of the note, judgment was obtained on it for the sum of \$72,254, upon which execution was issued, and on the 13th day of March, 1877, it was returned by the proper officer wholly unsatisfied. A bill was

Union Mutual Life Insurance Co. v. Frear Stone Manufacturing Co.

filed to foreclose the trust deed, and on decree obtained for the sale of the mortgaged property, it was sold to complainant for \$10,000, which, it is alleged, was twice its value. After giving credit for all that was realized by the mortgage sale, there remained the sum of \$65,221.06, still owing to complainant, to recover which the present bill was filed against the corporation and the stockholders. Most of the defendants paid \$10 on each share by them held, but others paid nothing, and the allegation of the bill is, that each shareholder is liable for the unpaid portion of his stock, whatever it may be. It is further alleged, no officer or agent of the complaining corporation had any knowledge or notice of the existence of the subscription paper, or that the stockholders had, in any manner, undertaken to limit their liability to pay for the stock by them subscribed, until November, 1876, which was long after the indebtedness to complainant had become due. Other matters are stated in the bill, but as they are not material to the decision of the case, they need not be noted. Most of the stockholders named as defendants demurred to the bill; others pleaded discharges in bankruptcy; others answered, and some were defaulted. The Circuit Court sustained the demurrer to the bill, and as the court was of opinion the bill could not be maintained against any of defendants, for want of equity, and that no relief could be decreed in favor of complainant on the facts alleged, on motion of complainant the bill was dismissed as to all of defendants, with the reservation to complainant of the right to assign error on the decision. That decree was affirmed in the Appellate Court, and complainant brings the case to this court on appeal.

In the view of the case we have taken, it is not material whether the agreement providing that the capital stock of the corporation shall be non-assessable applies to the whole stock, or only to that held by the subscribers to the agreement, and we shall not now discuss that question.

The charter of the defendant corporation was granted to it by the general assembly before the adoption of the present Constitution, and consequently, long before the passage of the general Incorporation Act, and is not therefore affected either by the Constitution or the general law on the subject of corporations. It is not claimed the charter imposes any liability on the stockholders beyond their obligation to pay for the stock by them subscribed, or what is the same thing, the obligation to pay for such stock implied in the act

Union Mutual Life Insurance Co. v. Frear Stone Manufacturing Co.

of subscription. Whether there is any express promise to pay for stock at the time of subscription, or not, the law implies such promise by the acceptance of such stock on the part of the holder. Unless, therefore, the agreement in evidence limits the liability of the stockholders to a less sum, there could be no question as to their liability for the par value of the stock. Upon the construction that shall be given to that instrument, the decision hinges.

It will be noticed the agreement provides : " First. The stock of the company shall be and remain as it now is, at \$300,000, in shares of \$100 each. * * * Third. No assessment shall ever be made upon the stock of the company. * * * Fifth. We agree to pay ten dollars upon each share subscribed by us, which is the sum total we shall be liable to pay." It is not shown the corporation ever assented to the limitation agreement, other than by issuing to subscribers stock under it. That may however be regarded as an acceptance of the subscriptions for stock on the terms stated in the agreement. The bill is framed on the theory the agreement, so far as the corporation may have consented to the limitation of the liability of the subscribers to pay the par value of the stock issued to them, is *ultra vires*, but having accepted the stock, the stockholders, by that act, became liable to pay the par value of the stock issued to and held by them. It is upon the principle, the assets of a corporation are trust funds for the payment of its debts, and the liability to pay for stock, implied in the act of accepting it, becomes as much a part of the trust fund as any asset of the corporation, and may be reached by the aid of the courts. It seems to be conceded such a limitation, as that contained in the agreement, would be void if it should be applied to corporations existing under general or special laws imposing personal liability on the stockholders, as an attempt to set aside or avoid a statutory obligation or duty. The argument in favor of the validity of the limitation agreement, insisted upon by the defense, is that in the absence of any statute imposing personal liability, such an agreement is valid and binding between the corporation and the stockholders, and as there is no privity between the creditors of the corporation and the stockholders, whatever equity the creditors may have must be worked out against the corporation. One reason assigned for the position assumed is, the creditors can enforce no obligation against the stockholders the corporation itself could not enforce. The latter proposition has neither principle nor the weight of recent judicial decisions for its

support. It is not true that creditors of a corporation cannot enforce obligations resting upon stockholders that the corporation might not be able to do. The rule rests on the doctrine of estoppel. The contract in this case may be binding on the corporation that accepted subscriptions to its capital stock on the terms therein expressed. It is for the reason it is competent for a corporation to contract with the stockholders. A corporation has no existence apart from its officers conducting its affairs, and who represent the shareholders. As between themselves, any contract fairly entered into would seem to be valid. At all events, a corporation will be estopped to say its contract is *ultra vires*, and sue its stockholders upon obligations arising by implication of law that it had once solemnly waived. But no such doctrine can be applied to creditors of a corporation. They sustain a widely different relation, both to the corporation and its shareholders. The distinction has its foundation in reason as well as in a sound public policy. The capital stock of a corporation by most recent decisions is a trust fund that the directors may not give away or misappropriate to the prejudice of parties whom they have invited to deal with the corporation. The State grants the franchise on the understanding the corporation created will have a capital stock, and the amount is usually fixed before the State parts with the franchise. It is for the security of all persons that deal with the corporation, as well as to afford the means to accomplish the objects of the incorporation. When the charter has fixed the minimum amount of capital stock, what warrant have the stockholders for saying a less sum shall constitute the capital stock? It would simply abrogate by private agreement that provision of their charter. Any device by which the members of a corporation seek to avoid the liability which the law imposes upon them is void as to creditors, whether binding or not as between themselves. Of this character is an agreement among the members that the shares of the capital stock of the corporation shall be regarded as "fully paid up." Such shares so issued are said to be *ultra vires*, at least to the extent that on the winding up of the corporation such shareholders will be adjudged contributories, unless it shall appear they have given for such stock the equivalent in money or in money's worth. Nor is it in the power of the shareholders by private agreement with the corporation to make the shares of stock issued to them non-assessable so as to excuse payment for such stock at its par value. That would

Union Mutual Life Insurance Co. v. Frear Stone Manufacturing Co.

deprive creditors of all security, which is the very thing the legislature intended to guard against by the provision in its charter the corporation should have a certain capital stock. The authorities that sustain these views are cited in Thompson's Liability of Stockholders, § 129, and in Green's Brice's Ultra Vires, 143.

The contract in this case comes within the inhibition of the principle stated. It was an attempt by a secret agreement between the shareholders to limit their liability to the corporation for stock issued to them to \$30,000, when the charter under which the company acted made the par value of the stock \$300,000. It is said the shareholders having made one contract for themselves, the courts cannot make another for them. The fallacy of the argument in support of this proposition is that the limitation sought to be imposed is valid as against the creditors. It is subversive of their rights, and therefore inoperative as to them. It is a breach of trust for the directors to issue shares of stock under such restrictions, and shareholders knowingly participating can derive no benefit from such a contract. In the case at bar the general assembly had fixed the capital stock the corporation should have, and certainly it was not within the power of the shareholders to say they would fix it at a less sum. It is doubtful whether a corporation can change its capital stock without legislative sanction. The weight of authority is against the right. This would seem to be so on principle. Stockholders are integral parts of the corporation, and if the constituent parts cannot, it is a logical sequence the body they compose cannot do it.

There is no ground for believing the State would have granted a franchise to this corporation had it been known its capital stock would not exceed the sum fixed by the stockholders. Such an agreement is inimical to the rights of creditors, and plainly against a sound public policy. Whether so intended or not, it might be the source of injury to persons trusting the corporation on the faith of its capital stock. The books showed the stock had all been issued, and a person dealing with the corporation may have known the shareholders were responsible, and so given credit to the concern. It would be a novel doctrine if shareholders, after the corporation had incurred large liabilities on the faith of the security supposed to be afforded by the stock held by them, will be permitted to avail of a private agreement between themselves and the corporation whose stock they hold, to the effect that no assessment shall ever be

Union Mutual Life Insurance Co. v. Frear Stone Manufacturing Co.

made on the stock of the company, or as in this case, that they have paid ten dollars on each share of stock by them subscribed, and that shall be the sum total they will be held liable to pay. It would be difficult to conceive of a contract more mischievous in its effects, or more at variance with our sense of justice and right. Availing of the benefits of the franchises conferred by the charter, fair dealing would require the shareholders should bear the burdens it imposed. It would be singular, indeed, if the shareholders could appropriate to themselves all profits that might be realized by the corporation, and yet contract to exempt themselves from all losses that might be sustained. Such is not the law, and a contract that would have that effect is clearly void, as being inhibited by a sound public policy. As was said in *Upton v. Tribilcock*, 1 Otto, 45, 'equally unsound is the opinion that the obligation of a subscriber to pay his subscription may be released or surrendered to him by the trustees of the company. This has often been attempted, but never successfully.' Most of the cases, certainly in this country, recognize and are based on the doctrine, the capital stock of a corporation is a trust fund for the security of its creditors that the directors have no rightful authority to misappropriate or give away. MILLER, J., in *Sawyer v. Hoag*, 17 Wall. 610, speaks of this as a doctrine of modern date, and adds, "it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen." The principle is in accord with our sense of justice and fair dealing. A rule that would permit stockholders to covenant with each other that the shares they hold might be taken at a nominal value, and be non-assessable, when the law makes them of par value, would work an injury to creditors the law will not tolerate. Cases of acknowledged authority on the liability of stockholders are: *Buchanan v. Smith*, 16 Wall. 300; *New Albany v. Burke*, 11 id. 96; *Sawyer v. Hoag*, 17 id. 610; *Upton v. Tribilcock*, 1 Otto, 45; *Sanger v. Upton*, 1 id. 56; *Henry v. Ver. & Ash. R. R.*, 17 Ohio, 187; *Noale v. Callender*, 20 Ohio St. 199; *Hartford & New Haven R. R. v. Kennedy*, 12 Conn. 499; *White Mt. R. R. v. Eastman*, 34 N. H. 124; *Ogilvie v. Knox Ins. Co.*, 22 How. 380; *Sagory v. Dubois*, 3 Sandf. Ch. 466. Many of these cases on examination will be found to contain reasoning appropriate to the facts of the case in hand. *Sagory v. Dubois* is a well reasoned case, and declares the salutary principle, that the capital stock fixed by such associations and specified in their certificates, is the amount the legislature re-

Union Mutual Life Insurance Co. v. Frear Stone Manufacturing Co.

quired to be paid or secured, as the foundation of the operations the statute permits them to carry on, and is imperatively demanded for the public security. In *Melvin v. Lamar Ins. Co.*, 80 Ill. 446; & c., 22 Am. Rep. 199, this court had occasion to discuss questions analogous with those involved in this decision. It was there said, "the subscribed stock of a corporation, as also its other property, is a trust fund, for the benefit of the general creditors of the corporation, and its governing officers cannot, by agreement with a stockholder, release him from his obligation, except by fair and honest dealing for a valuable consideration," citing with approval some of the cases cited *supra*. The same doctrine was declared in *Zirkel v. Joliet Opera House Co.*, 79 Ill. 334.

It is sought to take a distinction between the cases cited and the one now before the court, and the reason assigned is, defendants do not set up a release of any liability once assumed, but rest upon the terms of a contract between the corporation and the stockholders, under which there was no liability to pay beyond the amount fixed by such contract. The vice of the argument in support of this proposition lies in the assumption that the contract in this regard was valid and operative as against creditors of the corporation—an assumption, as we have seen, that is unwarranted. An objection much like the one taken in this case was insisted upon in *Melvin v. Lamar Insurance Co.*, and was regarded as untenable. In that case a large number of shares was issued to stockholders, coupled with the right on their part to surrender them and take back their money. It was said: "Such an agreement will be disregarded, and the party be held bound to all the responsibilities of a *bona fide* subscriber." So in this case. A large number of shares were issued to defendants—an amount in the aggregate nearly equal to the entire capital stock of the company—coupled with an agreement that the stock should be non-assessable, and the stockholders should only be bound to pay ten dollars on each share held by them as the sum total for which they should be liable. On the books of the corporation defendants appeared to be *bona fide* holders each of the number of shares for which he had subscribed. The allegation of the bill admitted by the demurrer to be true is that no officer or agent of complainant, when it became a creditor of the corporation, had any notice or knowledge of the existence of the agreement purporting to limit the liability of the stockholders. These facts bring the case within the principle of *Melvin v.*

Union Mutual Life Insurance Co. v. Frear Stone Manufacturing Co.

Lamar Ins. Co., and that case answers the objection taken in this case.

In *White Mt. R. R. Co. v. Eastman*, 34 N. H. 124, defendant subscribed for stock and took an agreement in writing that he might within one year surrender a part of the shares taken by him and be discharged. The agreement was held void as a fraud upon other subscribers. The principle sanctioned is that every subscriber must bear his just proportion of the common burden, to which he professes to bind himself by the contract he holds out to the public as his contract with the corporation. Other cases, cited *supra*, sustain the same doctrine.

So far as the record before this court discloses, defendants appeared to all persons dealing with the corporation to be stockholders, with no notice of any agreement their liability for shares held by them was less than what the law would impose in case of an unconditional subscription to the capital stock of a corporation. The secret agreement of the shareholders in this case must be regarded as void — certainly as to creditors of the corporation without notice — and the stockholders held to be bound to all the responsibilities of *bona fide* subscribers.

The judgment of the Appellate Court will be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

DICKEY, C. J., and CRAIG, J., dissented.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

SCHOOL TOWN OF MONTICELLO V. KENDALL.

(73 Ind. 91.)

Agency — negotiable instrument by public officer — mode of executing.

A negotiable note made by school trustees, for the proper purposes of their office, and purporting to be their individual obligation, but with the addition to their signatures of their official description, is binding upon the school corporation. (*See note, p. 142.*)

ACTION on promissory notes. The opinion states the case. The plaintiff had judgment below.

D. Turpie, H. D. Pierce and M. M. Sill, for appellant.

A. W. Reynolds and E. W. Sellers, for appellee.

WOODS, J. The action was by the appellee against the appellant upon two promissory notes, of which the following are copies :

“\$100.80.

MONTICELLO, Nov. 18th, 1870.

“On or before the first day of Nov., 1871, the subscriber, residing in Monticello, White county, State of Indiana, promise to pay O.

School Town of Monticello v. Kendall.

P. Baker, or bearer, one hundred and 80-100 dollars, negotiable and payable at bank, for value received, without any relief whatever from valuation or appraisement laws until paid. It is understood by the drawers and indorsers of this note, that they respectively waive presentment and protest, and notice of non-payment. If this note be collected by suit, the judgment shall include the reasonable fee for plaintiff's attorney.

"H. P. ANDERSON,

"W. S. HAYMOND

"C. W. KENDALL,

"Trustees of Monticello School."

"\$74.25.

MONTICELLO, IND., *July 20th, 1871.*

"One year after date we promise to pay to the order of William E. Sanderson, negotiable and payable at Monticello, Indiana, seventy-four and 25-100 dollars, with interest at the rate of ten per cent per annum after maturity, and with attorney fees, if suit be instituted on this note. Value received, without any relief whatever from valuation or appraisement laws. The drawers and indorsers severally waive presentment for payment, and notice of protest, and non-payment of this note.

"H. P. ANDERSON,

"C. W. KENDALL,

"School Trustees."

It is averred in the complaint that these notes were executed by the appellant, one for lightning rods and the other for a policy of insurance against fire, placed and written upon a school-house of appellant, and the notes were assigned by indorsement to plaintiff's intestate.

Upon an assignment of error, that the court erred in overruling the demurrer to the complaint, it is contended that the appellant had no power to execute these notes.

This question must be regarded as already settled by this court in the case of *Sheffield School Township v. Andress*, 56 Ind. 157, and cases cited.

It is further insisted that these notes do not purport to bind the corporation, and must be regarded as the notes of the individuals whose names are signed, and the words "School Trustees" and "Trustees of Monticello School" must be treated as mere *descriptive persons*. If the appellant were a private corporation, there would

School Town of Monticello v. Kendall.

be great force in the suggestion. *Hays v. Crutcher*, 54 Ind. 260. But the rule laid down, and so well illustrated in the case cited, is not without exceptions. Contracts made by public agents stand upon a different footing from those made by agents of persons or of private corporations.

We quote from Story on Agency, §§ 302, 303 and 304: "But a very different rule in general prevails in regard to public agents, for in the ordinary course of things an agent contracting in behalf of the government or of the public is not personally bound by such a contract, even though he would be by the terms of the contract, if it were an agency of a private nature. The reason of the distinction is that it is not to be presumed either that the public agent means to bind himself personally in acting as a functionary of the government, or that the party dealing with him in his public character means to rely upon his individual responsibility. On the contrary, the natural presumption in such cases is that the contract was made upon the credit and responsibility of the government itself. * * * This principle not only applies to simple contracts both parol and written, but also to instruments under seal which are executed by agents of the government under their own names, and purporting to be made by them on behalf of the government; for the like presumption prevails in such cases that the parties contract not personally, but merely officially, within the sphere of their appropriate duties. * * * So an indenture executed between A. B., describing himself as 'secretary of war,' of the one part, and C. D. of the other part, for a demise of certain buildings for public purposes, and for a certain period, and containing a covenant on the part of A. B. to pay the stipulated rent during that period, has been held not to bind A. B. personally, but to bind the government alone. The same principle applies to the case where public officers contracting for a public purpose afterward, upon a settlement of accounts with the other contracting party, strike a balance, and in writing promise to pay that balance on a specific day, signing their names, with their official designations annexed, as, for example, as commissioners; for such a written document is quite consistent with an intention not to incur any personal responsibility, but merely to apply the public funds which might be in their hands at the time prescribed toward the discharge of the public debt." See Story on Agency, § 306, and Wharton on Agency, §§ 512, 513. See, also, *Newman v. Sylvester*, 42 Ind. 106.

School Town of Monticello v. Kendall.

It is clear that a school town or township is a purely public corporation, and the trustees thereof public agents. These notes, therefore, which were confessedly executed upon considerations moving only to the use and benefit of the appellant, are binding on no one unless upon the appellant. We have no hesitation in holding them to be, under the facts averred and upon the proof made, the obligations of the appellant.

The judgment of the court below is affirmed with costs.

Petition for a rehearing overruled.

Judgment affirmed.

NOTE BY THE REPORTER. — The books are singularly destitute of cases precisely in point, that is, negotiable notes made by public agents, adding their official designation to their signatures, but not mentioning the principal. But in the very recent case of *Wing v. Gluck*, Iowa Supreme Court, June, 1881, it was held that the school trustees were individually liable upon a precisely similar obligation, and parol evidence to show the real principal was excluded; but the question whether the township would be liable upon it was not discussed. The court however seemed to take it for granted that it was not, for they said: "Most clearly such distinct township cannot be said to be a party to the contract so far as its terms are concerned. It follows that unless the contract can be held to be the contract of the defendants it is the contract of no one." The court seemed to lose sight of the distinction made in the principal case between officers of public and officers of private corporations. They put the defendants on the footing of the latter. They said: "It is well settled that where a person in executing a contract describes himself as agent without disclosing his principal, the contract becomes the personal obligation of the maker and no one else. *Kenyon v. Williams*, 19 Ind. 44. The case before us is not essentially different. The defendants describe themselves as officers, but the contract neither shows nor indicates the corporation of which they are officers. Some authorities have gone so far as to hold that the officer incurs a personal obligation, even where in the description of himself he fully sets out the corporation of which he is an officer. In *Haverhill Mutual Fire Ins. Co. v. Newhall*, 1 Allen, 130, the note upon which the action was brought was signed: 'Cheever Newell, President of the Dorchester Avenue R. R. Co.' As the note contained no words in the body thereof purporting to bind the Dorchester Avenue Railroad Company, it was held to be the personal obligation of the maker. The same rule was held in *Flake v. Eldridge*, 12 Gray, 476, where the note was signed, 'John S. Eldridge, Trustee of Sullivan R. R.;' and in *Sturdivant v. Hull*, 59 Me. 173, where the maker described himself as 'Treasurer of St. Paul's Parish;' and in *Barker v. Mechanics' Fire Ins. Co.*, 8 Wend. 94; 20 Am. Dec. 664, where the maker described himself as 'President of the Mechanics' Fire Ins. Co.;' and in *Powers v. Briggs*, 79 Ill. 498, where the makers described themselves as 'trustees of' a specified church; and in *Moss v. Livingston*, 4 Comst. 208, where an acceptor described himself as 'President of Rosendale Manufacturing Company.' See, also, *Hays v. Crutcher*, 54 Ind. 260, and *Gregory v. Leigh*, 33 Tex. 813. The defendants rely upon *Lacy v. Dubuque Lumber Co.*, 43 Iowa, 510. Whether that case can be reconciled with the cases above cited we need not determine. Conceding that it holds a very different rule, it is not authority for the defendants. The note in that case, it was held, appeared upon its face to be the obligation of the defendant corporation, at least with an explanation of abbreviations used."

The case of *Wing v. Gluck* is exactly consistent with the case of *Bayliss v. Peterson*, 15 Iowa, 279. In *Lacy v. Dubuque Lumber Co.*, 43 id. 510, the note was dated at the "office of Dubuque Lumber Company," and signed "M. H. Moore, P. D. L. Co." The court said: "It purports to have been executed in the office of defendant, and few business men would have difficulty in understanding the initials attached to the name of the party signing it, and would interpret them as meaning president of the Dubuque Lumber Com-

School Town of Monticello v. Kendall.

pany. But if this be not so and the letters are unintelligible without explanation, the law will permit such explanation to be given." See *Laftin and Rand Powder Co. v. Sinshelmer*, 48 Md. 411; s. c., 30 Am. Rep. 472; *Hager v. Rice*, 4 Col. 90; s. c., 34 Am. Rep. 68; *Burnham v. Brewster*, 79 Ill. 515; s. c., 23 Am. Rep. 177, and note, 179.

In *Trustees, etc., v. Rautenberg*, 88 Ill. 319, a negotiable note commencing, "I promise," etc., and signed by A. and B., "school trustees," was held the individual note of the signers, and not the note of the school corporation, the additional words being mere description. Nothing was said about the public character of the agency. The court concluded: "In the whole transaction we find no contract or privity between the trustees of schools of the village of Cahokia and the plaintiff."

Mr. Daniel (Neg. Inst., §§ 108, 305), without making any exception in the case of public agents, says: "That no party can be charged as principal upon a negotiable instrument unless his name is thereon disclosed;" and "if the agent sign a note with his own name and disclose no principal, he is personally bound." See, also, 14 Alb. L. Jour. 409; 15 id. 117, 345. Mr. Murray says, 14 id. 410: "The rule is well settled that he who takes negotiable paper contracts with him who on its face is a party thereto, and with no other person." But he gives no consideration to the peculiar case in question. Story (Agency, § 306) concedes that a public agent is liable if he signs a note in his own name. Mr. Thompson in his excellent work on Officers and Agents of Corporations does not seem distinctly to consider this topic, nor to cite *Wing v. Gluck* or *Bayliss v. Pearson*, nor does Mr. Daniel cite those cases.

Parsons says (1 Bills and Notes, 97): "If an agent of an incorporated company make a note, beginning, 'I promise,' etc., and sign it, 'A. B., agent of ——— company,' it is quite well settled that the company, not the agent, will be liable on the note." (We should say it is more nearly "quite well settled" the other way.) But he continues: "And the same rule applies, *a fortiori*, to the case of public officers or agents appointed to discharge public trusts and duties." To this he cites three cases, which we will examine.

Jones v. LeTombe, 3 Dallas, 384. This was an action on a bill of exchange drawn by "LeTombe, le Consul General," on the paymaster-general of the French republic. There was no reference in the body of the draft to any public purpose, but there was subjoined a request of payment from the French minister in the United States, addressed to the minister at the National treasury at Paris, together with a statement that he had guaranteed its payment "on the honor of the French Nation." "The court were unanimously and clearly of opinion that the contract was made on account of the government; that the credit was given to it as an official engagement, and that therefore there was no cause of action against the present defendant."

Tutt v. Hobbs, 17 Mo. 486. This was the case of an order drawn by H. and E., signing as "Trustees," on F., "Commissioner of Common Schools," etc., in favor of T. or order, for "the amount of tuition due him." The court held the drawers not liable. This was put on the ground that they were public officers, that the draft was on another public officer and that the draft was for public moneys. "Tutt knew what fund he was to look to for his pay. The general doctrine is that an agent who makes a contract on behalf of his principal, whose name he discloses at the time to the person with whom he contracts, is not personally liable, and in this respect there is no difference between an agent for government and an individual."

Fox v. Drake, 8 Cow. 191. This was an action on an instrument by which D. and P., signing as "Commissioners for building the court-house at Owego village," promised to pay "F., for work and labor on the court-house in the village of Owego," a certain sum, which "we find to be due him" therefor "on settlement." SAVAGE, C. J., said: "This is a case in which the defendants are not personally liable, unless it was clearly their intention to assume personal responsibility, which does not appear." The instrument was not negotiable, and it substantially appeared that the intent was to pay out of the public moneys.

These cases therefore afford no countenance to the principal case, and it seems to us of extremely doubtful soundness or authority.

GOODWIN V. SMITH.

(72 Ind. 118.)

Evidence — burden of proof — right dependent on a negative.

A statute enacted that a license to retail intoxicating liquors might be granted, provided the applicant be a fit person, and not in the habit of becoming intoxicated, but not otherwise. In an appeal by one whose application was refused, *held*, that the burden was on him to prove that he was a fit person and not in the habit of becoming intoxicated. (*See note, p. 148.*)

A PPEAL from a refusal to issue a license to retail intoxicating liquors. The defendant had judgment below.

D. W. Chambers, W. O. Barnard and F. W. Fitzhugh, for appellant.

J. R. Mellett and E. H. Bundy, for appellees.

ELLIOTT, J. The appellant applied to the board of commissioners of Henry county for a license to retail intoxicating liquors. License was refused. Appeal was taken to the Henry Circuit Court, and from that court change of venue was granted, upon the application of appellant, to the Wayne Circuit Court. Trial resulted in a verdict and judgment adverse to appellant's application.

Two errors are assigned, and in these words: "1st. The court erred in permitting the appellees to file their amended remonstrance. 2d. The court erred in overruling appellant's motion for a new trial."

[Omitting the former matter.]

The appellant's counsel argue that the motion for a new trial should have been sustained because of an alleged error in the instructions given the jury. The instruction, of which complaint is made, reads as follows: "To entitle the applicant to a verdict in his favor, he must prove by a preponderance of the evidence, that he is a person not in the habit of becoming intoxicated, and that he is a fit person to sell intoxicating liquors." We think this instruction was correct. The act in force at the time of the application, and at the time of the trial, that of March 17th, 1875, declares that a license may be granted to an applicant who gives due notice and

Goodwin v. Smith.

files the proper bond. "Provided, said applicant be a fit person to be intrusted with the sale of intoxicating liquor, and if he be not in the habit of becoming intoxicated; but in no case shall a license be granted to a person in the habit of becoming intoxicated." The language used is unusually emphatic. The repetition of the provision forbidding the issuing of a license to a person in the habit of becoming intoxicated emphasizes the intention of the legislature to exclude all who are in the habit of becoming intoxicated. If these provisions stood alone, the fair inference from the language used would be, that the legislature meant that the applicant should show himself to be one of the class of persons who of right may ask and receive a license. The general rule is, that one asking a right conferred by statute must show himself to be within the statute.

The clause prohibiting a certain class from receiving licenses is twice repeated, once in the negative form, "and if he be not in the habit of becoming intoxicated;" again in the affirmative form, "but in no case shall a license be granted to a person in the habit of becoming intoxicated." The first proposition, although negative in form, is not of that character which relieves the petitioner from the burden and places it upon the objector. It is as easily proved as its affirmative converse; for by proving the converse, the applicant is a man of habitual temperance in the use of intoxicating liquors, the negative is established. Indeed, the formal negative is not in that form susceptible of proof. It is established by proving its affirmative opposite. But the mere form of a proposition does not change the rule as to the burden. Lord ABINGER said upon a like question: "Looking at these things according to common sense, we should consider what is the substantive fact to be made out, and on whom it lies to make it out. It is not so much the form of the issue which ought to be considered, as the substance and effect of it. *Soward v. Leggatt*, 7 C. & P. 613.

The formal negative proposition quoted is closely blended and interwoven with the affirmative one, "a fit person to be intrusted with the sale of intoxicating liquors," and we cannot sever them so as to cast the burden of the affirmative on the petitioner, and that of the negative on his adversaries. The relations of the two are so intimate, and the language so emphatic, that it must be held that the burden of sustaining both propositions is upon the petitioner. If this be not the rule, then the commissioners would have no right to exact of the applicant any evidence at all, for it is now well

settled that where a petitioner, or plaintiff, is compelled to give any evidence at all upon all of the material matters alleged in his petition or complaint, he has the burden; although the matters which the other side must establish be far the more weighty and more difficult of proof. Under the provisions of the statute, we should be bound to hold that the burden was on the applicant, even though in doing so we should go counter to some general rule of evidence obtaining in ordinary cases.

We invade no general rule of evidence, in affirming that the burden in such cases as the present is on the petitioner. The general rule, deducible from the authorities, may be thus stated: Whoever asserts a right dependent for its existence upon a negative, must establish the truth of the negative by a preponderance of the evidence. This must be the rule, or it must follow that rights, of which a negative forms an essential element, may be enforced without proof. This conclusion would be both illogical and unjust, and we are therefore authorized to infer the truth of its converse. Confusion has arisen from statements loosely made by text-writers, and sometimes by courts; but it will be found upon examination, that wherever the question has been directly presented and considered with care, it has been uniformly held, that wherever the petitioner's right depends upon the truth of a negative, upon him is cast the *onus probandi*, except in cases where the matter is peculiarly within the knowledge of the adverse party. It is not because the proposition that the defendant has no license to retail liquor, is a negative one, that the State, in prosecutions for violations of the liquor law, is excused from making proof thereof, but because the fact is one peculiarly within the knowledge of the accused. The case of *Shearer v. State*, 7 Blackf. 99, puts the rule upon the ground that the matter is one peculiarly within the knowledge of the accused. An examination of the authorities there cited will show that the doctrine cannot be sustained upon any other ground. There are many cases declaring a doctrine different from that of our court as declared in *Shearer v. State*. The conflict in the authorities is sharp, and it may be said of them, as it was said of the troops of some of the European nations, "that they fight on both sides." 1 Greenl. Ev. (13th ed.), § 79, n; 1 Whart. Ev., § 368.

Among the cases applying the general rule, substantially as we have stated it, that where a negative is essential to the existence of the right, the party claiming the right has the burden, are those

Goodwin v. Smith.

holding, that in actions for malicious prosecutions the plaintiff must prove that there was no probable cause. *Smith v. Zent*, 59 Ind. 362; *Carey v. Sheets*, 67 id. 375; *Cummings v. Parks*, 2 id. 148; 2 Greenl. Ev., § 454. The same rule applies where the plaintiff sues for injuries arising from negligence in leaving dangerous excavations without protecting barriers; and it also applies in all cases where the claim is founded on a breach of duty in not repairing highways, for in all such cases a negative must be established. This is the rule in cases where the question is one of mutual negligence; the evidence must establish the negative proposition, that his own negligence did not proximately contribute. *Hale v. Smith*, 78 N. Y. 480; Shearm. & Redf. on Neg., § 12. In *Nash v. Hall*, 4 Ind. 444, it was held, that where a bill alleged that "the defendant in the suit did not make a tender of a deed," the burden was on the plaintiff. In that case, it was said: "Where the plaintiff grounds his right of action on a negative allegation, the establishment of which is an essential element in his case, he is bound to prove it, though negative in its terms." The case of *Smith v. Bettger*, 68 Ind. 254; s. c., 34 Am. Rep. 256, proceeds upon the same general doctrine; for it is there held that one who relies upon the negative allegation, that a negotiable promissory note was not taken in payment of a precedent debt, must prove his allegation. Where the action is against a tenant, and the breach assigned is, that he did not repair, the *onus* is upon the plaintiff. *Doe v. Rowlands*, 9 C. & P. 734; *Belcher v. McIntosh*, 8 id. 720; *Croft v. Lumley*, 6 H. L. C. 672. The rule under mention is as old as the case of *Berty v. Dormer*, 12 Mod. 526, where it was recognized and enforced by Chief Justice HOLT. In *Conyers v. State*, 50 Ga. 103; s. c., 15 Am. Rep. 686, it was held that the State, in a prosecution for suffering a minor to play a game of billiards, without the consent of his father, must prove the negative proposition, that the father did not consent. The Supreme Court of Illinois, in the case of *Beardstown v. Virginia*, 76 Ill. 34, 44, held that the burden of proving that a man was not a legal voter rested on the party asserting the proposition. Without commenting upon them, we cite, as sustaining the view we have taken, the following cases: *Williams v. East India Co.*, 3 East, 192; *Sissons v. Dixon*, 5 B. & C. 758; *Rodwell v. Redge*, 1 C. & P. 220; *Ridgway v. Ewbank*, 2 Moo. & R. 217; *Smith v. Davies*, 7 C. & P. 307. A familiar class of cases, in which indeed the rule is so often applied that its application suggests no thought

of any general doctrine to the contrary, is that class represented by actions for a breach of warranty as to the soundness of some article of personal property. In this large class of cases, the unquestioned rule is, that the plaintiff must prove the negative proposition, that the thing warranted to be sound was not sound. Other illustrations of the recognition and enforcement of the rule, as stated by us, might be given, but we think it unnecessary to prolong this opinion by adding cases or illustrations.

It is to be observed, that we are not considering how much evidence is required, where the allegation sought to be established is a negative, but the question we are considering is, who must prove the negative? The party, by whom it is asserted in such a case as the present, is in a much better situation to establish the negative, than his adversaries are to establish its affirmative converse; for his habits and his manner of life are better known to himself than to anybody else. He knows, better than any one else, those who are acquainted with his character and habits, and knows therefore where to obtain witnesses who possess the proper knowledge. It is no hardship to impose upon such a person the burden of proving a negative, upon which he grounds the right he asks the court to vindicate by its judgment.

Judgment affirmed, at costs of appellant.

Judgment affirmed.

NOTE BY THE REPORTER.—Wharton says (1 Ev., § 857): "It may be stated as a test admitting of universal application, that whether the proposition be affirmative or negative, the party against whom judgment would be given, as to a particular issue, supposing no proof to be offered on either side, has on him, whether he be plaintiff or defendant, the burden of proof which he must satisfactorily sustain." And at § 856: "He who in a court of justice undertakes to establish a claim against another, or to set up a release from another's claim against himself, must produce the proof necessary to make good his contention. This proof may be either affirmative or negative. Whatever it is, it must be produced by the party who seeks forensically either to establish or to defeat a claim."

In addition to the cases cited and explained in the principal case, the following are the main authorities illustrating this subject.

Where the burden of proof is on the plaintiff. Where the plaintiff averred that one who chartered his ship put on board a dangerous commodity without due notice to the captain. *Williams v. East India Co.*, 8 East, 192. In an action for not building according to specification, the defendant answering that he did build according to specification, the plaintiff must show that he did not. *Smith v. Davies*, 7 C. & P. 201. In an action on a charter party for not loading a sufficient cargo, the defendant answering that he did load a sufficient cargo, the plaintiff must show that he did not. *Ridgway v. Ewbank*, 2 Moo. & Rob. 217. So in *assumpsit* for embossing calico in a workmanlike manner. *Amos v. Hughes*, 1 Moo. & Rob. 464. In *assumpsit* for breach of warranty that a horse was sound. *Osborn v. Thompson*, 9 C. & P. 337. In covenant for breach of covenant to occupy in a proper manner and keep in repair. *Doe v. Rowland*, *id.* 734. In an action on a life insurance policy, where the defendant alleges a breach

Goodwin v. Smith.

of the representation that the assured was in good health on the application. *Geach v. Ingall*, 14 M. & W. 95; *Ashby v. Bates*, 15 id. 589. In an action on a note signed by A. B. as agent of a corporation, the facts showing that it was not a corporate obligation must be shown by plaintiff. *Bradley v. McKee*, 5 Cr. Circ. 298. In an action for the value of wood cut by defendant on the plaintiff's land, the defendant alleging that it was cut on the land of another, the plaintiff must show that it was not. *Gilmore v. Wilbur*, 18 Pick. 517. In an action by a passenger against a railroad company for an assault by its conductor, the burden of proof that the plaintiff was ejected for non-payment of fare is on defendant. *St. John v. Eastern R. Co.*, 1 Allen, 544. In an action by the owners of a toll bridge to recover tolls, where they have exempted certain persons, they must prove that defendants were not exempt. *Central Bridge Corporation v. Butler*, 3 Gray, 130. In an action for attaching exempt household furniture, the plaintiff must prove that not enough was left to satisfy the statute. *Gordon v. Clapp*, 113 Mass. 333. In an action for freight on a charter-party, the declaration alleging the performance of all requisites, the issue being on unnecessary delay and deviation. *Funcheon v. Harvey*, 119 Mass. 469. In an action charging a want of proper care and diligence upon an agent in his transaction of the principal's business. *Heinemann v. Heard*, 68 N. Y. 443, 456. In an action on contract, declared forfeited by the State, and alleged by the plaintiff to have been wrongly forfeited. *State v. McGinley*, 4 Ind. 7. Where a devise is set up as an execution of a power, and the validity of the allegation depends on the question whether the testator had any other real estate on which the devise could operate, the burden is on the party setting up the will. *Doe v. Johnson*, 7 M. & G. 1047. TINDAL, C. J., said: "Where a party seeks, from extrinsic circumstances, to give effect to an instrument, which, on the face of it, it would not have, it is incumbent on him to prove those circumstances, though involving the proof of a negative." In an action by holder against surety of a promissory note, the defendant alleging notice to collect and neglect by the holder, the latter must prove that the note could not have been collected. *Strickler v. Burkholder*, 47 Penn. St. 476. Where one files a bill to cancel a deed on the ground that it never was executed. *Kerr v. Freeman*, 33 Miss. 323.

Where the burden of proof is on the defendant. Where in answer to an action for loss of imported goods by a carrier, the defendant averred that unless the goods were duly entered at the custom-house the importation was illegal and the contract of carriage void, the defendant must prove the non-entry. *Stassons v. Dixon*, 5 B. & O. 738. In an action against an actor for not performing at a licensed theater, according to contract, the want of license must be shown by the defendant. *Rodwell v. Redge*, 1 C. & P. 220. In an action on an insurance policy, where the defendant alleges the non-communication of a material fact on the application. *Elkin v. Janson*, 13 M. & W. 655. When defendant pleads payment. *Hankin v. Squires*, 5 Biss. 186; *Adams v. Field*, 25 Mich. 16; *Kendall v. Brownson*, 47 N. H. 186. Where to a plea of the Statute of Limitations the plaintiff replies that the accounts were merchants' accounts, and the defendant rejoins that they were not open and current. *McLellan v. Crofton*, 6 Me. 307. In an action for the price of goods, where the defendant relies upon a breach of warranty. *Dorr v. Fisher*, 1 Cush. 371. In an action on a promissory note, where defendant sets up that the consideration was illegal. *Pratt v. Langdon*, 97 Mass. 97. In an action on a note, the defendant having shown fraud in its inception, must prove notice of it to the plaintiff. *Reeve v. Liverpool, etc., Ins. Co.*, 39 Wis. 530. In a suit to enforce a contract to pay for sheep, where defendant set up a breach of warranty that the sheep were not diseased. *Milk v. Moore*, 39 Ill. 584; *S. P., Maltman v. Williamson*, 69 id. 423. In an action on a note for medical services, the defendant alleging that the payee was not a licensed physician. *Barton v. Sunderland*, 5 Rich. 57. Where the plaintiff alleges that A. was at a certain time of sane mind, and defendant denies it. *Sutton v. Sadler*, 3 C. B. (U. S.) 87, (This is put on the ground that sanity is presumed.) Where there was a promise to pay a sum of money unless a certain quantity of oil should arrive at certain ports at a certain time. *Gray v. Gardner*, 17 Mass. 188. Where the defendant sets up a prior conviction in bar. *Com. v. Daley*, 4 Gray, 209. In an action against a common carrier for failure to transport, and he sets up an excuse for the failure. *Lewis v. Smith*, 107 Mass. 334. In an action by one for personal injury by a railroad company, through negligence, where the

Templeton v. Voshloe.

proofs showed that the car was thrown from the track, without plaintiff's fault, defendant must show himself without fault. *Sullivan v. Phil., etc., R. Co.*, 80 Penn. St. 234; *Zemp v. Wilmington*, 9 Rich. 84. So of injury to goods. *Ketchum v. Ex. Co.*, 52 Mo. 390; *Steele v. Townsend*, 37 Ala. 247. In an action on a life insurance policy, where the complaint alleged that the death was not caused by the breach of any of the conditions or agreements in the policy, and the defendant denied this, and set up facts showing a breach of such conditions, the court said the allegation in the complaint was unnecessary and need not be proved. *Murray v. N.Y. Life Ins. Co.*, New York Court of Appeals, April, 1881.

TEMPLETON V. VOSHLOR.

(73 Ind. 134.)

Water — surface — concentration and increase on another's land.

The owner of an upper field may not so concentrate surface water upon his own land as to increase its natural flow upon a lower field of another.*

ACTION of damages for injury by surface water. The opinion states the case. The defendant had judgment below.

W. Loudon, for appellant.

A. P. Hovey, G. V. Menzies and W. P. Edson, for appellee.

NIBLACK, C. J. In this action the plaintiff, Andrew J. Templeton, complained of the defendant, William Voshloe, and said that at the time of the commission of the grievances hereinafter alleged he was, and still continued, in the lawful possession of a certain described tract of land in Posey county, and that the defendant was in the possession of a certain other tract of land adjoining the plaintiff's said tract, also fully described; that within about ten rods of the boundary line between the said two tracts of land, and parallel with said line, there runs entirely across the said tract of the defendant a natural ridge or elevation of land about two and one-half feet in height, which ridge, in its natural condition, causes all the water which falls on the defendant's tract lying east of said ridge, and which flows upon it from a south-easterly direction, to flow back from the plaintiff's land, in a south-easterly direction, over

* See *Noonan v. City of Albany* (79 N. Y. 470), 35 Am. Rep. 540; and note, 543; *McCormack v. Kans. City, etc., R. Co.* (70 Mo. 359), 35 Am. Rep. 431; *Gillson v. City of Charleston* 16 W. Va. 282, post; *Gibbs v. Williams*, 25 Kans. 210, post.

and across the land of the defendant and lands other than the land of the plaintiff, contiguous thereto ; that the defendant on or about the 1st day of March, 1878, unlawfully and wrongfully cut through said ridge, or elevation of land, in two places, to the depth of two and one-half feet and four feet wide, and extended from said openings so cut by him a ditch three feet wide and two feet deep to the land of the plaintiff, and thereby caused a great quantity of water to flow continuously from that time to the time of bringing this suit over and upon the said land of the plaintiff, injuring and destroying the crops of corn, wheat and grass upon the same, to the damage of the plaintiff in the sum of one hundred dollars.

The defendant demurred to the complaint, and his demurrer was sustained. The plaintiff refusing to plead further, final judgment was rendered in favor of the defendant upon demurrer.

We have only to consider the question of the sufficiency of the complaint. In the argument in this case, a great number of authorities have been cited bearing upon the general subject of surface water, caused by rain and melting snow, but only a portion of the authorities thus cited have any direct application to the precise question involved in this appeal.

In referring to the subject under discussion, Washb. *Ease*, mar. p. 353, says: " Before proceeding to consider the law as to water percolating through the earth, beneath its surface, it is necessary to refer to a few principles which seem now to be pretty well settled as to the respective rights of adjacent land-owners; in respect to waters which fall in rain, or are in any way found upon the surface, but not embraced under the head of streams or water-courses, nor constituting permanent bodies of water, like ponds, lakes, and the like. It may be stated as a general principle, that by civil law, where the situation of two adjoining fields is such that the water falling or collected by melting snows, and the like upon one naturally descends upon the other, it must be suffered by the lower one to be discharged upon his land if desired by the owner of the upper field. But the latter cannot by artificial trenches, or otherwise, cause the natural mode of its being discharged, to be changed to the injury of the lower field, as by conducting it by new channels in unusual quantities on to particular parts of the lower field."

The principle recognized by the text thus quoted from is well illustrated and sustained by several leading cases referred to, and commented upon, by the learned author.

Johnson v. Thompson.

From these and other decided cases, we deduce the doctrine that the owner of the upper field may not construct drains or excavations so as to form new channels on to the lower field, nor can he collect the water of several channels and discharge it on the lower field so as to increase the wash upon the same. The right of the owner of the upper field to make drains on his own land is restricted to such as are required by good husbandry and the proper improvement of the surface of the ground, and as may be discharged into natural channels, without inflicting palpable and unnecessary injury on the lower field.

As to where, and under what circumstances, the owner of the lower field may obstruct or direct the flow of surface water which naturally descends upon his land, we did not now inquire, as that question is in no way involved in the proper decision of this cause.

Tested by the doctrine deduced and announced as above, the complaint in this case appears to have been sufficient upon demurrer. *Butler v. Peck*, 16 Ohio St. 334; *Martin v. Riddle*, 26 Penn. St. 415; *Kauffman v. Griesemer*, id. 407; *Martin v. Jett*, 12 La. 501; Ang. on Watercourses, § 108, *et seq*; *Miller v. Laubach*, 47 Penn. St. 154; *Livingston v. McDonald*, 21 Iowa, 160; *Adams v. Walker*, 34 Conn. 466; Wood on Nuis. 403, § 386; *Pettigrew v. Village of Evansville*, 25 Wis. 223; s. c., 3 Am. Rep. 50; *Taylor v. Fickas*, 64 Ind. 167; s. c., 31 Am. Rep. 114; *Schlichter v. Phillipy*, 67 Ind. 201; *Hoyt v. City of Hudson*, 27 Wis. 656; Washb. on Eas. 209, 210; Cooley on Torts, 577; *Waffle v. N. Y. C. R. R. Co.*, 58 Barb. 413.

The judgment is reversed with costs, and the cause remanded for further proceedings.

Judgment reversed.

JOHNSON V. THOMPSON.

(72 Ind. 167.)

Evidence — opinion — value of services.

A non-expert witness, familiar with the facts, may testify as to the relative value of services and commodities entering into a mutual account.*

*To same effect, *Printz v. People*, (42 Mich. 144). 36 Am. Rep. 437.

Johnson v. Thompson.

ACCOUNT on account. The opinion states the case. The defendant had judgment below.

E. A. Ely, C. H. Burton, F. B. Posey and J. W. Wilson, for appellant.

J. H. Miller and E. P. Richardson, for appellee.

NIBLACK, C. J. Complaint by Milton S. Johnson against Arthur Thompson, in four paragraphs. The first paragraph was for work and labor performed by the plaintiff for the defendant, both before and after he arrived at the age of twenty-one years, covering a period of over seven years. The second was for one hundred dollars for extra work in preparing for planting and cultivating a crop of tobacco. The third was a money demand for an alleged breach of a contract by the defendant in failing to convey to the plaintiff a forty-acre tract of land on his arrival at full age. The fourth was a demand for money for a similar failure to convey to the plaintiff an eighty-acre tract of land, or to render him some equivalent service in lieu of such conveyance.

The defendant answered: 1. In general denial; 2. Payment; 3. Setting up a contract, by which it was agreed that the plaintiff was to live with, and work for, the defendant as a member of his family, and to receive certain personal property on his arrival at the age of twenty-one years, and averring that said contract had been mutually and fully performed; 4. A set-off; 5. That the defendant had furnished the plaintiff with money, food, clothing, schooling and other necessities equal in value to all the work and labor performed by the plaintiff; 6. Setting up a contract similar to that described in the third paragraph, and averring a ratification of such contract by the plaintiff on his arrival at full age, and a full performance of the contract by the defendant on his part.

The plaintiff replied in denial of all the special paragraphs of the answer. Verdict and judgment for the defendant.

At the trial, there was evidence tending to show that the plaintiff had lived with and worked for the defendant on his farm for a period of more than seven years. This evidence was accompanied with the opinion of witnesses as to the value of the labor thus performed by the plaintiff. There was also evidence tending to show that during the time the plaintiff lived with him, the defendant

gave the plaintiff money as he needed it, and furnished him schooling, clothing, medical attendance, and other necessities; also that the defendant gave the plaintiff considerable personal property on his becoming of age.

The defendant was thereupon examined as a witness in his own behalf. He testified as to the terms on which the plaintiff came to live with him, and the length of time and the manner in which the plaintiff had worked for him. Also, to the aggregate amount of money given to the plaintiff from time to time, and to the various articles of property received from him by the plaintiff when he became twenty-one years of age.

Counsel for the defense then propounded to the defendant the following question: "Taking into consideration the money you let plaintiff have, the doctors' bills you paid for him, and all the other things you did for him, what, if any thing, would his work be worth more than you paid him?" To which the plaintiff objected, but his objection was overruled, and the defendant answered: "It would be worth nothing more."

One Levi Thompson, a son of the defendant, was also examined as a witness for the defense, to whom under similar circumstances, and over the plaintiff's objection, a like question was propounded, and to which substantially the same answer was given.

The decisions of the court overruling the plaintiff's objections to those questions were assigned as causes for a new trial.

The appellant insists that it was not competent for the witnesses, to whom questions were propounded as above, to give their opinions in such general terms as to the relative values of services and commodities which entered into the material accounts of the parties, and cites a series of cases decided by this court, holding that a witness cannot be permitted to express his opinion as to the amount of damages resulting from an alleged injury, as supporting in principle, and by analogy, the position he assumes. But the cases thus cited by the appellant do not go to the extent contended for by him.

The authorities recognize a well-defined distinction between the opinion of a witness as to the amount of damages sustained in a given case, and his opinion as to the value of a service or commodity concerning which he has been called upon to testify.

Greenleaf on Evidence says: "Non-experts may give their opinions on question of identity, resemblance, apparent condition of body or mind, intoxication, insanity, sickness, health, value, conduct and

Johnson v. Thompson.

bearing, whether friendly or hostile, and the like." See note to § 440, vol. 1, p. 495, 13th edition. See also the dissenting opinion of DOR, J., in the case of *State v. Pike*, 49 N. H. 399, 422, 423 ; s. c., 6 Am. Rep. 533 ; *Illinois, etc., R. R. Co. v. Van Horn*, 18 Ill. 257 ; *Dwight v. County Commissioners, etc.*, 11 Cush. 201 ; *Evansville, etc., R. R. Co. v. Cochran*, 10 Ind. 560.

The rule as thus stated by Greenleaf is well sustained by other decided cases, and is one by which we feel it our duty to be governed.

As a matter of practice, the questions objected to in this case were too general and indefinite, and afford a very unsatisfactory precedent for the examination of witnesses in similar cases ; but construing them to have been only efforts to bring out, and as tending to have had the effect of bringing out, in an indirect way, the opinions of the witnesses touching the value, relative and otherwise, of services and other kindred things involved in the mutual dealings of the parties, we do not feel authorized to hold that the admission of those questions constituted such an error as requires a reversal of the judgment.

Opposing counsel had the right of testing the value of the answers to the questions complained of by a cross-examination as to the facts upon which the witnesses based their conclusions, and of their enabling the jury to properly estimate the weight to which such answers were entitled as evidence in the cause.

The appellant also insists that the evidence did not support the verdict, but the argument he submits on that point is addressed to the mere weight of the evidence, which was a question for the jury and not for us.

There was evidence tending to fully sustain the verdict, and beyond that we are not authorized to consider any question of the sufficiency of the evidence.

The judgment is affirmed, with costs.

Judgment affirmed, with costs.

BUCKLES V. ELLERS.

(73 Ind. 220.)

Statute — extra-territorial force.

A statute, authorizing a woman to prosecute an action in Indiana for her own seduction, gives her no right of action where the seduction was accomplished in another State, although the illicit intercourse continued in Indiana. (See note, p. 160.)

ACTION for seduction. The opinion states the case. The plaintiff had judgment below.

J. L. Ray, W. P. Britton and M. W. Bruner, for appellant.

E. C. Snyder, for appellee.

NIBLACK, C. J. The complaint in this case was by Mary Ellers, an unmarried woman, against Wiley Buckles, for seduction. A jury returned a verdict for the plaintiff, assessing her damages at \$1,000, and after denying a motion for a new trial, the court rendered judgment in her favor upon the verdict.

The only question made here by the appellant is upon the alleged insufficiency of the evidence to sustain the verdict.

The appellee was the principal and only important witness in her own behalf. She stated that at the time of the trial she lived in Hamilton county, in this State; that she went to Champaign, Illinois, to live, in June, 1875, where, as a means of living, she became engaged in sewing and dress-making; that she became acquainted with the appellant at that place in September, 1876, when she was under twenty years of age; that she first casually met him upon the street, where he was introduced to her by a mutual acquaintance; that after this meeting he called to see her at her boarding house quite frequently, sometimes taking her out riding, and sometimes to places of amusement. She then proceeded:

“After he had been calling on me for a few weeks, we became engaged to be married. We then had sexual intercourse frequently. About every time he came to see me, we had sexual intercourse. It was on account of my love for him, thinking he would marry me, that I submitted to his embraces. He continued to call on me

Buckles v. Ellers.

and have sexual intercourse with me, at Champaign, Illinois, from the fall of 1876, to September, 1877, when I went, on the I., B. & W. R. R., with him to the city of Indianapolis, Indiana. He was on his way to the races at Louisville, Kentucky, and I was going to my father's, near Noblesville, Indiana. We stopped all night at the Shearman House, at Indianapolis, as husband and wife, and occupied the same room and bed, and had sexual intercourse there. He registered as 'W. Busy and Lady.' The reason why I had intercourse with him there, at that time, was because I loved him better than any other man, and had confidence in him. I thought he would marry me, and that we would go to Kansas in the spring. The next day he went to Louisville and I went home. He paid all my expenses, hotel bill and railroad fare, and gave me money to go home on to my father's."

She further stated that the next time she met the appellant was in October, 1877, at the city of Crawfordsville, where they stopped at a hotel, as husband and wife, and again had sexual intercourse, she coming to that city at his request; that the next and last time they met was at Covington, in this State, in the latter part of January, 1878, where they spent two or three days together, occupying the same bed, and again having sexual intercourse, from which she became pregnant, and from which a miscarriage resulted.

On cross-examination the appellee admitted that at the time she first met the appellant and made his acquaintance, she was the mother of an illegitimate child, some three or four years old, and went by the assumed name of "May Anderson," claiming to be a married woman living separate from her husband; also that during the time she sustained intimate relations with the appellant he gave her small sums of money from time to time, and that resulting from such relations she had also had a miscarriage in the spring of 1877.

The question for our decision is, did the evidence, set out as above, which embraces all that was most favorable to the appellee, make out, or fairly tend to make out, against the appellant an actionable charge of seduction under the laws of this State?

The first objection urged against the sufficiency of the evidence is, that it was shown affirmatively that the supposed injury complained of was committed in the State of Illinois, and that hence no right of action accrued to the appellee for such supposed injury under any statute of this State.

Upon the point presented by this objection there seems to be some confusion in and apparent conflict between the authorities bearing upon it, but we think this confusion and apparent conflict have resulted more from a failure in very many cases to observe the distinction which evidently exists and ought to be well recognized. as regards their general transitory character, between common-law actions and actions purely statutory in their origin than from any other cause.

In Story on the Conflict of Laws, p. 369, § 307 *d*, 13th edition, it is said: "In general where actions *ex delicto* are held transitory, and suits allowed to be maintained in a foreign forum, the right of action and the nature and extent of damages must be estimated according to the law of the place where the wrong was committed." To this proposition some rather confusing and unsatisfactory exceptions are noted by the learned author, but the exceptions do not overthrow the general rule as stated above by him.

Rorer on Inter-State Law, at pages 144 and 145, after reviewing the authorities on the general subject, announces as a conclusion that in all purely personal actions of a transitory nature for torts at common law a citizen of a State may sue a citizen of another State in the courts of such other State, or of any State wherein he may reside, or may be found and served with process, without regard to the place or State in which the injury may have been perpetrated. But that where certain acts are made wrongs by statute, which were not such theretofore, or where remedies additional to those which existed at common law are provided by statute, advantage can be taken of these new and additional remedies only within the territory or locality in which the statute has force. These constitute new rights, so to speak, and depend for their enforcement always upon the statutes by which they are created. And such statutes will be enforced only by the courts of the State wherein they are enacted.

Taking the conclusion thus reached by Rorer in respect to statutory actions in connection with the authorities relied on to sustain the text, the inevitable inference is that a statute providing a right of action for a personal injury has no extra-territorial force, and does not confer a right of action for an injury inflicted in another State. See *McCarthy v. Chicago, Rock Island and Pacific Railroad Co.*, 18 Kans. 46; s. c., 26 Am. Rep. 742, and the authorities cited in that case.

Buckles v. Ellers.

Section 24 of our Code, 2 R. S. 1876, p. 43, confers upon every unmarried woman the right to prosecute an action for her own seduction; but under the construction given, and as we believe, correctly given as above stated to analogous statutes, that provision of the Code has no extra-territorial force, and does not authorize such an action to be maintained in this State for acts of seduction committed in another State.

It is manifest from the evidence in this case that if the appellee was in fact seduced by the appellant the seduction took place and was fully accomplished in the State of Illinois. The illicit intercourse testified to as having occurred in this State did not constitute a new and independent case of seduction, as contended for by the appellee, but was merely consequential to the alleged seduction which had previously taken place.

But it may be insisted, that conceding that the *gravamen* of the appellant's supposed offense was shown to have been perpetrated in the State of Illinois, still the appellee was entitled to prosecute her action in this State in the spirit and as a matter of comity between the two States. The rules governing the prosecution of actions by comity between States have no application to this case, for two reasons:

First. Nothing being shown to the contrary on the trial, we must assume that the common law was in force in Illinois on the subject of prosecutions for seduction. By the common law the appellee acquired no right of action against the appellant for her own seduction, and hence putting the worst possible construction upon the evidence as against the appellant, she did not bring with her from Illinois any right of action to be enforced in this State.

Secondly. If it had been shown upon the trial that there was some statute of Illinois conferring upon her a right of action for her own seduction, that would not have authorized the appellee to prosecute this action in the court below upon principles of comity, as it is only common-law rights, or such rights as are recognized as existing by the general usage of civilized nations, which can be enforced by comity in a foreign forum. Rorer on Inter-State Law, 4, 5 and 6.

For the reasons given we are of the opinion that the evidence failed to show a cause of action entitling her to a recovery in any of the courts of this State; and that in consequence the judgment in this case cannot be sustained.

Buckles v. Ellers.

The conclusion we have reached renders it unnecessary that we shall consider other objections urged to the sufficiency of the evidence.

The judgment is reversed with costs, and the cause remanded for a new trial.

Reversed and remanded.

NOTE BY THE REPORTER. — A similar question has been much discussed of late, namely, whether under a statute allowing damages for a negligent injury resulting in death an action may be maintained in one State when the injury was inflicted in another. This question has different phases, according as a similar statute exists in both States, or there is no such statute in the State where the injury is caused. The question must also be distinguished from the question whether an administrator appointed in the one State can maintain the action in the other, or whether the action must be brought by an administrator of the State where it is prosecuted.

In *LeForest v. Tolman*, 117 Mass. 109; s. c., 19 Am. Rep. 400, it was held that no action could be maintained in Massachusetts under a statute awarding double damages for injuries from the bite of a dog, without proof of the *scienter*, for an injury caused by the bite of a dog in New Hampshire, there being no proof of a similar statute in New Hampshire, or that the defendant knew of the vicious propensity of the dog. This agrees with the principal case.

In *McCarthy v. Chicago, etc., Ry. Co.*, 18 Kans. 46; s. c., 26 Am. Rep. 742, cited in the principal case, it was held that under a statute of Kansas conferring a right of action for damages for death caused by a wrongful act, no action can be maintained where the death, although occurring in Kansas, was caused by injuries inflicted in another State. There the administrator was appointed in Kansas, but the court held that even if it should be presumed — there being no proof — that a similar statute existed in Kansas, it would not follow that there could be a recovery in Kansas. Citing *Richardson v. N. Y. Cent. R. Co.*, 98 Mass. 85; *Woodard v. M. S. & N. I. R. Co.*, 10 Ohio St. 121. The latter case supports that doctrine, but in the former the rule of the common law was in force, and it was held that the action under the New York statute could not be maintained in Massachusetts by an administrator appointed in Massachusetts.

In *Leonard v. Columbia Steam Nav. Co.*, 39 N. Y. 48, it was held that under the New York statute the action could be maintained in New York by a New York administrator for death caused by an injury inflicted in Connecticut, there being a similar statute in Connecticut. The court said that at common law, personal actions whether *ex contractu* or *ex delicto* are transitory (Bouv. L. Dic.) and may be brought anywhere and are governed by the *lex fori*. An action for assault committed in another State will lie here. *Smith v. Bull*, 17 Wend. 823. But the statutes here giving an action for damages resulting from culpable negligence do not apply where the injury was committed in another State or country unless the laws of such State are proved to be of a similar character. *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Beach v. Bay State Steamb. Co.*, 30 Barb. 433; *Crowley v. Panama R. Co.*, id. 99; *McDonald v. Mallory*, 77 N. Y. 547; s. c., 33 Am. Rep. 664. It is not necessary that the statute should be precisely the same as the statute of this State; that it is similar is enough. The statute of Connecticut agrees in its main features with that of New York. The doctrine that an action will lie when the common law or the statutes of different States or countries correspond is sustained by numerous authorities. *Mochazo v. Willes*, 3 B. & Ad. 358; *Melan v. Duke de Fitz James*, 1 Bos. & P. 138; *Mostyn v. Fabrigas*, 1 Cowp. 161; *Shipp v. McCraw*, 2 Murph. 463; *Wall v. Hoskins*, 5 Ired. 177; *Stout v. Wood*, 8 Blackf. 71. Cases cited as showing that an administrator appointed in one State cannot bring actions given by statute of another (*Richardson v. New York Cent. R. Co.*, 98 Mass. 85; *Woodard v. Mich. So. R. Co.*, 10 Ohio St. 121; *Needham v. Grand Tr. R. Co.*, 38 Vt. 295; *State v. Pittsburg, etc., R. Co.*, 45 Md. 41; *Selma R. Co. v. Lacey*, 43 Ga. 461; *Marcy v. Marcy*, 32 Conn. 308), held, not analogous.

In *Mackay v. New Jersey Cent. R. Co.*, 14 Blatchf. 65, 'n the United States Circuit Court

Buckles v. Eilers.

for the southern district of New York, it was held, SHIPMAN, D. J., that a statute of New Jersey, authorizing a suit for damages for the death of a person by negligence to be brought in the name of the personal representative of such deceased person, does not authorize a suit by an administrator of such person appointed in New York. The court remarked, upon the present question: "It is manifest that the right of an administrator to recover for the pecuniary injuries resulting from the death of the intestate to the widow and next of kin is unknown to the common law, and exists only by statute. It has been held that such a statute has no extra-territorial force, and that no recovery can be had thereon for an injury which was committed beyond the limit of the State by whose legislature the statute was enacted. *Whitford v. Panama R. Co.*, 28 N. Y. 465; *Beach v. Bay State Co.*, 30 Barb. 433." The laws of New York "do not confer upon these representatives of deceased persons any power to obtain damages for injuries resulting in death which the deceased received in another State. This question has been considered by the Supreme Courts of Massachusetts and of Ohio. In *Richardson v. N. Y. Central R. Co.*, 98 Mass. 85, a Massachusetts administratrix sued a New York corporation for damages, by reason of the death of the plaintiff's intestate through the negligence of the defendants in New York. The right to sue was founded upon a New York statute which is very similar to the New Jersey statute. The court say: 'The plaintiff is the administratrix appointed under the laws of Massachusetts. Her right to sue in this Commonwealth in her representative capacity is upon causes of action which accrued to the intestate, or which grow out of his rights of property or those of his creditors. The remedy which the statutes of New York give to the personal representatives of the deceased, as trustees of a right of property in the widow and next of kin, is not of such a nature that it can be imparted to a Massachusetts executor or administrator *virtute officii*, so as to give him the right to sue in our courts, and to transmit the right of action from one person to another in connection with the representative of the deceased. The only construction which the statute can receive is that it confers certain new and peculiar powers upon the personal representative in New York. A succession in the right of action not existing by the common law, cannot be prescribed by the laws of one State to the tribunals of another.' To the same effect is the decision in *Woodward v. Michigan South., etc., R. Co.*, 10 Ohio St. 121."

But in *Dennick v. Central R. Co. of New Jersey*, 103 U. S. 11, it was held that where a statute of New Jersey gives a right of action for death by negligence, to "be brought by and in the name of the personal representatives of such deceased person," an administrator of one whose death was caused by negligence in New Jersey, appointed in New York, can maintain an action in the courts of the latter State to enforce the liability imposed by the statute of the former. The court, MILLER, J., observed upon the present question:

"It is indeed a right dependent solely on the statute of the State, but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognises as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here.

"It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right.

"Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties.

"The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial, and the local court in New York, and the Circuit Court of the United States for the northern district, were competent to try such a case when the parties were properly before it. See *Mostyn v. Fabrigas*, 1 Cowp. 161; *Rafael v. Verelt*, 2 W. Bl. 1055; *McKenna v. Fisk*, 1 How. 241. We do not see how the fact that it was a statutory right can vary the principle. If the defendant was legally liable in New Jersey he could not escape that liability by going to New York. If the liability to pay

Anderson v. Spence.

money was fixed by the law of the State where the transaction occurred, is it to be said it can be enforced nowhere else because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several States have substituted the statute for the common law, the liability can be enforced in no other State but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her Civil Code. Can these rights be enforced or the wrongs of her citizens be redressed in no other State of the Union? The contrary has been held in many cases. See *Ex parte Van Riper*, 20 Wend. 614; *Lowry v. Inman*, 46 N. Y. 119; *Pickering v. Fisk*, 6 Vt. 102; *Railroad v. Sprayberry*, 8 Baxt. 241; s. c., 35 Am. Rep. 705; *Great Western R. Co. v. Miller*, 19 Mich. 205."

On the point of the foreign administrator the court said, among other things: "We are aware that the case of *Woodward v. Michigan Southern R. Co.*, 10 Ohio St. 120, asserts a different doctrine, and has been followed by the cases of *Richardson v. New York Cent. R. Co.*, 98 Mass. 85, and *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 Kans. 46; s. c., 26 Am. Rep. 742. The reasons which support that view we have endeavored to show are not sound. These cases are opposed by the latest decision on the subject in the Court of Appeals of New York, in the case of *Leonard v. Columbia Steam Navigation Co.*, 30 N. Y. 48."

As we have seen, however, the administrator in the *Leonard* case was appointed in New York, where the suit was brought, and the court distinguished the cases of an administrator of another State. The *Leonard* case and the *Dennick* case are strong authorities against the *obiter* expression contained in the second conclusion near the end of the principal case. The *Dennick* case of course overrules the *Mackay* case.

ANDERSON V. SPENCE.

(72 Ind. 315.)

Statute of frauds — promise to indemnify for becoming bail.

An oral promise to indemnify another for becoming bail for a third, indicted for felony, is not within the statute of frauds, and is enforceable.

ACTION on an oral promise to indemnify for becoming bail. The opinion states the case. The plaintiff had judgment below.

T. J. Stott and *R. M. J. Miller*, for appellant.

M. W. Fields and *W. H. Trippet*, for appellee.

ELLIOTT, J. Mary Sullenger was indicted by the grand jury of the Gibson Circuit Court for assault and battery with intent to kill, and was in custody upon that charge. Anderson, the appellant, desired to secure her release, and procured Spence, the appellee, to enter into the usual recognizance for her appearance at the next

Anderson v. Spence.

term thereafter of the said Circuit Court. To induce the appellee to enter into the recognizance, the appellant verbally agreed to indemnify him against all loss, and to save him harmless from all liabilities, costs and charges. The recognizance was forfeited, and appellee compelled by process of law to pay the stipulated penalty. He sued the appellant upon his oral promise and obtained a judgment from which this appeal is prosecuted.

Appellant contends that the contract upon which the action is founded creates no liability, and in support of his contention states and argues these two general propositions: 1st. There was no consideration to support the promise made to appellee; 2d. That as the agreement was not in writing, it is void, because it is a contract to answer for the default of another, and therefore within the statute of frauds.

There is nothing in the first proposition deserving discussion, and we put it aside with the remark that appellant got all the consideration he stipulated for; and he is not now in a position to make a complaint (at least with much prospect of having it heeded) of lack of consideration.

The second proposition involves an inquiry into the nature of the oral agreement upon which appellee relies. If it is an original agreement, it is not within the statute; if a collateral one, it is; The great weight of authority is, that an original agreement is not within the statute, although it may directly concern a third person, or relate to the performance of some act by one not a party to the contract. *Thacher v. Rockwell*, 4 Col. 375; *Edenfield v. Canady*, 60 Ga. 456; *Hartley v. Varner*, 88 Ill. 561; *Johnson v. Knapp*, 36 Iowa, 616; *Smith v. Cramer*, 39 id. 413; *Lester v. Bowman*, id. 611; *Emerson v. Slater*, 22 How. 28; *De Wolf v. Rabaud*, 1 Pet. 476; *Morrison v. Baker*, 81 N. C. 76; *Spooner v. Dunn*, 7 Ind. 81; *Crawford v. King*, 54 id. 6; *Billingsley v. Dempewolf*, 11 id. 414; *Nelson v. Hardy*, 7 Ind. 367; *Beaty v. Grim*, 18 id. 131.

The general rule, as we have stated it, is in its terms clear, and is well supported by the authorities, but there is much difficulty in determining what are original or what collateral agreements. The cases upon this point are much in conflict, and it is by no means an easy task to determine from them what are to be deemed original contracts. The first case in our own reports, which directly bears upon the question under discussion is that of *Brush v. Carpenter*, 6 Ind. 78, where it was held, "An oral promise by A.

to B. to indemnify B. against loss, if he will become replevin bail for C., is void under the statute of frauds." The case was not very carefully considered, and very few of the adjudged cases seem to have been brought to the attention of the court. The case of *Brush v. Carpenter*, 6 Ind. 78, did not receive any direct notice from the time it was decided except a bare reference in two cases, until the decision in *Horn v. Bray*, 51 Ind. 555, where it was cited and commented upon at much length, and declared to lay down an erroneous rule, the court saying: "The ruling in *Brush v. Carpenter* is against the current of American adjudications, and has been, in effect, though not expressly, overruled by the subsequent decisions of this State." The question in *Horn v. Bray*, 51 Ind. 555, was whether a verbal contract of indemnity as between sureties was valid, and it was not there necessary to expressly approve or directly overrule *Brush v. Carpenter*. Here we must approve or condemn. There is not a little confusion in our own cases upon the subject of what is an original and what a collateral contract, but the weight is decidedly against the doctrine of *Brush v. Carpenter*.

The English cases have not been at all harmonious. The old case of *Winckworth v. Mills*, 2 Esp. 484, held that a promise of indemnity was within the statute, but in *Thomas v. Cook*, 8 B. & C. 728, the contrary doctrine was declared. *Thomas v. Cook* was, in turn, overruled in *Green v. Cresswell*, 10 A. & E. 453. For a long time the doctrine of *Green v. Cresswell* has been viewed with disfavor, and it was, long before its overthrow, often severely censured, notably so in the cases of *Batson v. King*, 4 H. & N. 739, and *Cripps v. Hartnoll*, 4 B. & S. 414. After a long struggle the doctrine of *Green v. Cresswell* was directly overthrown in *Reader v. Kingham*, 13 C. B. (N. S.) 344. In the later case of *Wildes v. Duddlow*, L. R., 19 Eq. Cas. 198, *Reader v. Kingham* is expressly approved, the court saying that the case of *Thomas v. Cook*, 8 B. & C. 728, was decided "upon the plainest principles of common sense and justice."

While the doctrine of *Green v. Cresswell*, *supra*, was still recognized as the law of England, the courts declared that there was an important and broad distinction between the undertaking as surety in civil cases and that as bail in criminal proceedings. This doctrine is stated with clearness and force by POLLOCK, C. B., in *Cripps v. Hartnoll*, 4 B. & S. 414, 116 Eng. C. L. 116. This learned judge, after speaking of *Green v. Cresswell*, *supra*, said:

Anderson v. Spence.

"But there is a great distinction between that case and the present. Here the bail was given in a criminal proceeding; and where bail is given in such a proceeding, there is no contract on the part of the person bailed to indemnify the person who became bail for him. There is no debt, and with respect to the person who bails, there is hardly a duty; and it may very well be that the promise to indemnify the bail in a criminal matter should be considered purely as an indemnity, which it has been decided to be. Now it has been laid down that a mere promise of indemnity is not within the statute of frauds, and there are many cases which would exemplify the correctness of that decision." The English cases therefore establish a rule which would take the present case out of the statute, even though it be conceded that the doctrine of *Green v. Cresswell* should be deemed the correct one. We confess however that it seems to us that there was a real conflict between the doctrine of *Green v. Cresswell* and that of *Cripps v. Hartnoll*. and that the distinction attempted to be made by the later case was simply an effort to get rid of an unsound doctrine without expressly overruling it. *Green v. Cresswell* was always in conflict with the English cases, and there are many of them holding, to borrow the language of the cases, "That the debt or default must be toward the promisee." *Eastwood v. Kenyon*, 11 A. & E. 438; *Fitzgerald v. Dressler*, 7 C. B. (N. S.) 374. There is no "debt or default toward the promisee" in cases where one person becomes bail for another at the request of a third. In such a case, it is impossible to conceive a debt or default as existing toward the promisee.

Long before the final overthrow of *Green v. Cresswell*, many, indeed most of the American courts, had accepted the doctrine, which indeed had never been directly challenged, either in England or America, that the debt or default must be toward the promisee, and had carried it to its logical conclusion. There are however many American cases holding to the doctrine of *Green v. Cresswell*, some of them somewhat extending it. With the downfall of the original case, the doctrine which it declared, always plainly erroneous upon principle, must, in time, be repudiated by all the courts of the land.

In *Aldrich v. Ames*, 9 Gray, 76, SHAW, C. J., speaking for the court, held an oral promise of indemnity made to one to induce him to become bail for another to be good. In *Holmes v. Knights*, 10 N. H. 175, an oral promise to indemnify a plaintiff, if he would become bail for a third person, was held not to be within the

statute. Cases are cited in *Horn v. Bray*, from the reports of Massachusetts, Pennsylvania, Iowa, Maine, New Hampshire, Vermont, Maryland, Georgia and Kentucky, showing that a contract to indemnify is not within the statute; and to these may be added *Vogel v. Melms*, 31 Wis. 306; s. c., 11 Am. Rep. 608; *Shook v. Vanmater*, 22 Wis. 532; *Reed v. Holcomb*, 31 Conn. 360; *Sanders v. Gillespie*, 59 N. Y. 250; *Green v. Brookins*, 23 Mich. 48; s. c., 9 Am. Rep. 74; *Stocking v. Sage*, 1 Conn. 519. The general doctrine, that a promise to indemnify the promisee for becoming surety for a person other than the promisor is not within the statute, is approved by many of the text-writers. 3 Pars. Cont. (6th ed.), 21 n; Roberts on Frauds, 223; 1 Hilliard Cont. 384, § 11, 385, § 12; Throop Verbal Agreements, § 361.

Our own cases have declared the same general doctrine. In *Downey v. Hinchman*, 25 Ind. 453, it was said that, "To make the promise collateral, the party for whom the promise is made must be liable to the party to whom it is made." In *Palmer v. Blain*, 55 Ind. 11, it was held that a verbal promise by one person to the creditor of an execution issued on a judgment against a third, that if he will satisfy such execution, the promisor will make payment of the judgment in property and money, was not within the statute. *Green v. Cresswell* is cited with approval in *Crosby v. Jeroloman*, 37 Ind. 264; but the point involved in that case was very different from that here under discussion. The question in *Crosby v. Jeroloman* was whether there had been a novation, not whether the contract was an original or collateral one; and it was rightly held, that unless the original debt was extinguished by the new promise, the case was not taken out of the statute. In *Ellison v. Wisheart*, 29 Ind. 32, the question and the holding were the same as in *Crosby v. Jeroloman*. The question in *Druly v. Hunt*, 35 Ind. 507, was presented by the refusal to give the jury the following instruction: "If Druly promised to guarantee or warrant the pay to plaintiff which had been promised to be paid by a public meeting, his promise was only collateral, and not binding on Druly unless in writing." It is very plain that no such question as the one involved in the present could have arisen in that case. It may be safely affirmed, without further citation, that there is no case in our own reports directly supporting the doctrine of *Brush v. Carpenter*, and that there are several indirectly condemning, and one, at least, censuring it in express words, and in effect, overthrowing it.

Anderson v. Spence.

There is, in principle, an obvious and important difference between a contract of guaranty and one of indemnity. The former is a collateral undertaking and presupposes some contract or transaction to which it is collateral. *Dole v. Young*, 24 Pick. 250; *Storv* on Prom. Notes, § 457; *McMillan v. Bull's Head Bank*, 32 Ind. 11; s. c., 2 Am. Rep. 323; *Gaff v. Sims*, 45 Ind. 262; *Dickinson v. Colter*, id. 445; *Taylor v. Taylor*, 64 id. 356, 359. The contract, though in form a guaranty, may be so framed as to constitute an absolute and original undertaking, as was the case in *Frash v. Polk*, 67 Ind. 55, but even in that class of cases there is an obligation from the party whose act or contract is guaranteed, and there is also a debt, and may be default, toward the promisee. It is impossible to conceive a guaranty as existing without some act or contract guaranteed. A contract of indemnity is essentially an original one. Between the promisor and promisee there is a direct privity. Between the person to whom the promise of indemnity is given, and the person for whom the latter undertakes as surety or bail, there is no privity at all. No matter what may be done by the person for whom bail is entered, at the request of a third, he who becomes bail cannot have any action, because as to the person bailed the undertaking was purely voluntary. *White's Ex'rs v. White*, 30 Vt. 338; *McPherson v. Meek*, 30 Mo. 345. The contract is an original and independent one, in which there is no debt or default toward the promisee, to which there are no collateral contracts, and in which there is no remedy against the third party. A contract of this character has long been held not to be within the statute. *Read v. Nash*, 1 Wils. 305; *Tomlinson v. Gill*, Amb. 330; *Loomis v. Newhall*, 15 Pick. 159; *Harrison v. Sawtel*, 10 Johns. 242; 6 Am. Dec. 337; *Toplis v. Grane*, 5 Bing. N. C. 636; *Marcy v. Crawford*, 16 Conn. 549. The general rule running through almost all the cases is, that if the third person is not liable, then the undertaking is not within the statute. This doctrine is exemplified in the great number of cases, which hold that a promise to answer for the debt or default of an infant or *feme covert* is not within the statute, because there is no third person bound. *Harris v. Huntbach*, 1 Burr. 373; *Chapin v. Lapham*, 20 Pick. 467; *Mease v. Wagner*, 1 McCord, 395; *Drake v. Fleiwellen*, 33 Ala. 106; *Roche v. Chaplin*, 1 Bail. 419.

It must be held, both upon principle and authority, that the cases which confuse the contracts of guaranty and indemnity, and

Richardson v. Snider.

place both upon the same footing, were erroneously decided, and that they are not to be accepted as true interpreters of the law. Among these cases is that of *Brush v. Carpenter*, already overruled in effect, so that nothing is now left for us to do except add the formal declaration overruling it. In *Wildes v. Dudlow, supra*, the vice-chancellor said: "I am surprised to find that there has been so much conflict;" and added: "I am happy to find, that the matter having been most carefully and elaborately considered in the case of *Reader v. Kingham*, when the full number of judges was present, the case of *Green v. Cresswell* was overruled, and the law as laid down by *Thomas v. Cook* restored." And this, we think, may fairly be taken as the expression of the feeling of the judges who have given to this long-vexed question much thought.

It is insisted by appellant that the appellee voluntarily paid the money. We need not decide whether the appellee had or not a right to pay without compulsion by judicial process, for there was a judgment rendered at the suit of the State. Upon the point suggested see *Beal v. Brown*, 13 Allen, 114; *Randolph v. Randolph*, 3 Rand (Va.) 490. The objection of the appellant is that the record introduced in evidence does not affirmatively show that the appellee was served with summons, and we are referred to *Hawkins v. Hawkins' Adm'r*, 28 Ind. 66. That case is not at all in point; there the question was directly presented by appeal, here the attack is collateral. Where a collateral attack is made upon the judgment of a superior court of general jurisdiction, and the record is silent, jurisdiction is presumed.

Judgment affirmed at the costs of the appellant.

Judgment affirmed.

RICHARDSON V. SNIDER.

(72 Ind. 425.)

Partnership — notice of dissolution — dealers.

Agents, clerks and salesmen of one with whom a firm has had dealings are not entitled to actual notice of its dissolution.

ACTION on account. The opinion states the facts. The plaintiff had judgment below.

Richardson v. Snider.

S. T. McConnell and *T. J. Tuley*, for appellants.

D. B. McConnell and *R. Magee*, for appellees.

ELLIOTT, J. [Omitting other questions.] The third paragraph of the complaint is upon an account for goods sold and delivered to the firm of Hall & Smith, of which all the appellants are alleged to have been members. Upon this paragraph of the complaint, an instruction was based by the trial court, of which the appellants Richardson and Annabel complain. By their motion for a new trial, by their assignment of errors, and in their brief, these appellants insist that the first instruction given to the jury was erroneous. In order that the force of the instruction complained of may be understood, it is necessary to give a brief synopsis of the evidence touching the point upon which the instruction bears. Smith, Hall, Richardson and Annabel had been partners, but in November, 1875, the partnership was dissolved, Richardson and Annabel retiring, and a notice of dissolution published in the newspapers; but the business was continued, without any change of the firm name by Smith & Hall. The firm of Smith & Hall, prior to November, 1875, had dealt with Louis Snider, but had never dealt with the firm Louis Snider's Sons. Louis Snider was represented in his dealings with Smith & Hall prior to the withdrawal of Richardson and Annabel, by some of the appellees, but they were not however associated with him as partners, but simply as agents. The goods described in the third paragraph were sold after the dissolution of the partnership which had existed between the appellants, and the withdrawal of Richardson and Annabel from the firm of Smith & Hall. The instruction under mention is somewhat lengthy and confused, and it need not be copied, as the legal proposition, which it asserts, can be stated in a condensed form. It declares, in substance, that if any of the appellees, as agents of Louis Snider, had acquired knowledge from the dealings of Smith & Hall with Louis S. Snider, that Richardson and Annabel were members of that firm, and goods were sold to said firm of Smith & Hall after the withdrawal of Richardson and Annabel, the latter were liable, unless they had shown that the firm of Louis Snider's Sons had actual notice of the dissolution of the firm of Smith & Hall, and the withdrawal of Richardson and Annabel. This instruction was erroneous. Richardson and Annabel were bound to give actual notice only to those with

whom the firm of Smith & Hall had previously dealt. No dealings at all had ever been had by Smith & Hall with the firm of Louis Snider's Sons, and the retiring partners were under no obligation to give them notice. It cannot be held, because some of the agents of Louis Snider knew who composed the original firm of Smith & Hall, that when they, the agents, established an entirely new firm, they were entitled to notice of dissolution. Certainly this would not be seriously contended, if the agents of Louis Snider had gone to some distant city and there formed a new partnership; and yet the principle is precisely the same. Nor could it be seriously insisted that each of the agents would have been entitled to actual notice if there had been a separation, and each had gone into a new and distinct firm. The rule requiring notice to those with whom the firm has previously dealt does not require actual notice to be given to persons with whom the firm had never directly dealt, although such persons may have been the clerks or salesmen of one with whom the firm did have previous dealings. This must be the rule, or else it must follow, that it would be the duty of persons retiring from a firm to give actual notice to clerks, salesmen, bookkeepers and every one else who had been in the service of one with whom the firm had previously dealt, and who had acquired knowledge, through such services of the members of the partnership. The rule as to actual notice does not require that it shall be given to those who, as agents, represent the person with whom the firm deals, but that it shall be given to the principal. In no just sense can it be said that the dealing is with the agent, for the act of the agent is that of his principal.

Judgment reversed, at cost of appellees.

Judgment reversed.

STEINMETZ V. KELLY.

(72 Ind. 442.)

Negligence — contributory — assault and battery.

The doctrine of contributory negligence has no application in an action of assault and battery. The person assaulted is not bound to retreat.

ACTION of assault and battery. The opinion states the case. The plaintiff had judgment below.

Steinmetz v. Kelly.

E. P. Ferris and *W. W. Spencer*, for appellant.

W. D. Wilson and *C. H. Wilson*, for appellee.

WORDEN, J. Action by the appellee against the appellant for assault and battery. The complaint consisted of three paragraphs, a demurrer to each of which, for want of sufficient facts, was overruled. The first, the only one to which any specific objection is made in this court, alleged that the defendant, on, etc., "violently and unlawfully assaulted the plaintiff, and struck him, and also threw him, the plaintiff, from the house of the defendant on to the street pavement, in front of the defendant's house, with great violence, fracturing," etc.

The defendant answered: *First*. "That at the time of the injury complained of the plaintiff was in the bar-room, in the house where the defendant was keeping a hotel and bar-room, and that the same occurred on defendant's premises; that the plaintiff became noisy and boisterous, and the defendant requested the plaintiff to leave his said bar-room several times, which the plaintiff refused to do; and defendant says the plaintiff unlawfully took hold of the defendant, in a rude, insolent and angry manner, when the defendant took the plaintiff outside of the door of his said bar-room, using no more force than was necessary to do so, and that he then released the plaintiff, when the plaintiff fell down upon the pavement, on account of his being intoxicated, and without the fault of the defendant caused the injury complained of, by plaintiff's own conduct."

Second. General denial.

The plaintiff replied by general denial to the first paragraph of answer. Trial by jury, verdict and judgment for the plaintiff for \$500.

The counsel for the appellant in their brief say: "We shall not stop now to discuss the merits of the complaint further than to say that the first paragraph of the complaint shows an eviction from the defendant's premises, and we have thought that the paragraph should aver that the injury occurred without the fault of the plaintiff." The paragraph does not charge an injury to the plaintiff arising out of the negligence of the defendant, but an unlawful assault upon and battery of the plaintiff's person. In such cases it is not necessary to allege that the plaintiff was without fault, or,

in other words, was not guilty of contributory negligence. There remains nothing more to be considered except such questions as arise on a motion for a new trial.

[Omitting minor matters.]

The defendant asked that the following interrogatory be answered by the jury, if they should return a general verdict, viz.: "Did the fault or negligence of the plaintiff contribute in any way to the injury of the plaintiff, received on the evening of the 3d of March, 1876?" The court declined to direct the jury to answer the interrogatory, and in this we think no error was committed.

The right of the plaintiff to recover depended not upon any negligence of the defendant, but upon the assault and battery, which if perpetrated at all by the defendant was intentional and purposed. It may be that the defendant did not intend to inflict so severe an injury upon the plaintiff as seemed to result from the excess of force applied by him; but it does not therefore follow that he did not intend to apply that force.

The doctrine that contributory negligence on the part of the plaintiff will defeat his action has been generally applied in actions based on the negligence of the defendant, in short, in cases involving mutual negligence. But it has also been applied in some cases where the matter complained of was not negligence merely, but the commission of some act in itself unlawful, without reference to the manner of committing it, as the willful and unauthorized obstruction of a highway, whereby a person is injured. *Butterfield v. Forrester*, 11 East, 60; *Dygert v. Schenck*, 23 Wend. 446.

The doctrine however can have no application to the case of an intentional and unlawful assault and battery, for the reason that the person thus assaulted is under no obligation to exercise any care to avoid the same by retreating or otherwise, and for the further reason that his want of care can in no just sense be said to contribute to the injury inflicted upon him by such assault and battery.

An intentional and unlawful assault and battery inflicted upon a person is an invasion of his right of personal security, for which the law gives him redress, and of this redress he cannot be deprived on the ground that he was negligent and took no care to avoid such invasion of his right.

The trespass was purposely committed by the defendant. If he could excuse it on the ground of the alleged misconduct of the plaintiff, and if he employed no more force than was necessary and

Steinmetz v. Kelly.

reasonable, that was a complete defense. Otherwise the plaintiff, if he made out the trespass, was entitled to recover, and no negligence on his part, as before observed, could defeat his action. The case of *Ruter v. Foy*, 46 Iowa, 132, is in point. There the plaintiff alleged that the defendant had assaulted and beat her with a pitchfork. On the trial the defendant asked, but the court refused, the following instruction: "If you find from the evidence that the plaintiff was injured, or contributed to her injury, by her own act or negligence, defendant would not be liable for assault and battery upon her, and plaintiff cannot recover." On appeal the court said upon this point: "The doctrine of contributory negligence has no application in an action for assault and battery."

The case here is entirely unlike that of *Brown v. Kendall*, 6 Cush. 292. There the defendant's dog and another were fighting. The defendant was beating the dogs with a stick in order to separate them, in doing which he accidentally hit the plaintiff in the eye with the stick. It was held that trespass *vi et armis* was the proper form of action, because the injury to the plaintiff was immediate; but that as the parting of the dogs was a proper and lawful act, and as the hitting of the plaintiff was not intentional, but a mere accident or casualty, the plaintiff could not recover at all, without showing a want of ordinary care on the part of the defendant; and then that contributory negligence on the part of the plaintiff would defeat the action.

Although, according to the common-law system of pleading, trespass *vi et armis* was the proper form of action in such case, the essential and only ground on which the action could rest was the negligence of the defendant in doing an act lawful in itself, whereby the plaintiff was injured, and this is so as fully as if the plaintiff had framed his declaration in case for the negligence.

The difference between that case and the present is substantial and vital. In that case the battery was unintentional, and the defendant therein was guilty of no wrong, save his negligence. Here the defendant intentionally perpetrated the battery, and the plaintiff's right to recover was not based upon the negligence of the defendant at all.

[Omitting matters of pleading.]

We find no error in the record.

The judgment below is affirmed with costs.

Petition for a rehearing overruled.

Judgment affirmed.

BOARD OF COMMISSIONERS OF GRANT COUNTY V. BRADFORD.

(79 Ind. 455.)

Municipal corporation — power to offer reward.

County commissioners have no inherent power to offer rewards or employ persons for the detection of crime.*

ACTION for a reward. The opinion states the case. The plaintiff had judgment below.

R. W. Bailey and A. Diltz, for appellant.

A. Steele and R. T. St. John, for appellee.

Howk, J. Moses Bradford, the appellee, sued the appellant and alleged, in substance, in his complaint, that the appellant, at its December term, 1872, offered a reward of two hundred dollars for the arrest of one Perry Myers, and ordered the same to be entered of record in the record of its proceedings, but that through inadvertence said order was overlooked and was not entered of record; that the appellant, at the time, supposed that said order was so recorded, and acted thereon; that the appellee having learned of said order and record, and the publication of said record, and acting thereon, arrested said Perry Myers and delivered him to the authorities of Grant county, Indiana, when he, the said Myers, was duly tried, convicted and sentenced to the penitentiary, where he then was; and the appellee asked the court to order and decree that the appellant should enter of record the aforesaid order, and that the said reward should be paid by the appellant to the appellee, and to grant him such other relief as might be just in the premises.

The cause was tried by a jury, and a verdict was returned for the appellee, assessing his damages in the sum of two hundred dollars; and the appellant's several motions, for a *venire de novo*, for a new trial, and in arrest of judgment, in the order named were severally overruled by the court, and to each of these decisions the appellant excepted. Judgment was then rendered for the appellee, and against the appellant, upon and in accordance with the verdict of the jury.

* To same effect *Hanger v. City of Des Moines* (52 Iowa, 193), 35 Am. Rep. 206.

Board of Commissioners of Grant County v. Bradford.

The following decisions of the Circuit Court the appellant has here assigned as errors: 1. In overruling its motion for a *venire de novo*; 2. In overruling its motion for a new trial; 3. In overruling its motion in arrest of judgment; 4. In overruling its motion to change the form of the judgment; 5. In giving the jury instructions numbered 1, 2 and 3, over its objections; 6. The complaint did not state facts sufficient to constitute a cause of action; and 7. The judgment is void, because of the insufficiency of the complaint.

The questions, arising under each of these alleged errors, have been ably and elaborately argued by the learned counsel of the respective parties; but the view which we shall take of the appellee's supposed cause of action renders it unnecessary for us to follow counsel in their arguments, or to consider or decide any other question than the sufficiency or insufficiency of the appellee's complaint.

The board of commissioners of a county is a creature of the statute, and is vested with and possessed of just such powers, rights, privileges and franchises, corporate, judicial, legislative and ministerial, as the statute has conferred upon it, and such as are clearly and necessarily implied, to enable it to carry out and accomplish the objects and purposes of its creation. The law confers no power, and enjoins no duty, upon the board of commissioners of a county to aid in the arrest, prosecution or conviction of a person charged with the commission of crime, either by an offer of reward or by the employment of detective or professional skill. If it be conceded that the facts stated in appellee's complaint are sufficient to show a contract by the appellant for the payment to the appellee of the reward alleged to have been offered by it for the arrest of Perry Myers (a point which may well be doubted, but which we need not and do not decide), we are of the opinion that this contract, by and on the part of the appellant, was clearly *ultra vires*, and cannot be enforced.

The case at bar does not differ in principle from the recent case of *Hight v. Board, etc., of Monroe Co.*, 68 Ind. 575. In the case cited, Hight alleged in his complaint that he had been employed by the county board, the appellee, to co-operate with the attorneys for the State, and under their directions, to aid the prosecution of divers persons, charged with the murder of an unknown man, in said Monroe county, and that under such employment, he had expended

Board of Commissioners of Grant County v. Bradford.

both time and money in assisting in such prosecution, etc. On appeal to this court, the power of the county board to make such a contract, and its validity, were the questions for decision. On these questions, BIDDLE, J., speaking for the court, said: "Is there any express power or any implied power necessary to execute any express power, or perform any duty, granted or enjoined by the act under which the board of commissioners is organized, which authorizes it to make the contract set out in the complaint? We think not, There is no express power by which the board can employ a person to aid the attorneys of the State in 'more effectually prosecuting, and procuring to be prosecuted,' any person charged with a crime; and no express power making it the duty of the board to employ a person to aid in any such purpose; nor is there any express power granted to or duty enjoined upon the board, which renders such employment for such purposes necessary or proper to execute its powers or perform its duties."

To the same effect is the decision of this court in the case of *Board, etc., of Ripley Co. v. Ward*, 69 Ind. 441. In that case the appellees were attorneys, and sued to recover their fees for professional services by them rendered, under an alleged contract with the appellant, the county board, in a criminal prosecution of an ex-treasurer of the county, on an indictment for embezzlement of the funds of the county. On appeal, this court held that "The board of commissioners had no power to employ the appellees as attorneys to conduct the criminal prosecution mentioned in the special finding of the jury, and the county could not therefore be compelled to pay for services rendered under such employment."

For the reasons given we think that the appellee's complaint, in the case now before us, does not state facts sufficient to constitute a cause of action.

The judgment is reversed, at the appellee's costs, and the cause is remanded with instructions to give leave to appellee to amend his complaint, and for further proceedings in accordance with this opinion.

Reversed and remanded.

 Ruddell v. Fhalor.

RUDDELL V. FHALOR.

(73 Ind. 588.)

Negligence — signing note without reading.

In an action on a promissory note, by a *bona fide* holder against the makers, the defendants jointly answered that their signatures were procured by the payee's fraud and representation that the note was a different contract, and that one of the makers could not read English, and that the note was incorrectly and fraudulently read to him by the payee. *Held*, insufficient.*

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

W. W. Woollen, J. S. Dailey and L. Mock, for appellant.

Howk, J. This was a suit by the appellant against the appellees upon a promissory note, of which the following is a copy :

"\$500.00.

LANCASTER TP., WELLS CO., IND.,

"February 1st, 1872.

"Six months after date (or before, if made out of the sale of Drake's Horse Hay-Fork and Hay-Carrier), we promise to pay to James B. Drake, or order, five hundred dollars, payable at the First National Bank of Indianapolis, value received, with use, without any relief from valuation or appraisement laws; if suit shall be instituted to enforce the payment thereof, I agree to pay a reasonable attorney's fee.

(Signed)

"GEORGE and JOHN FHALOR,

"SOLOMON FHALOR.

"Witness : CHAS. GOLDEN,
"E. W. BETTES."

"Indorsed : J. B. DRAKE."

"September 22d, 1873. For value received, being in settlement of partnership business, I hereby assign my interest in this note to James H. Ruddell, without recourse.

(Signed)

"W. W. WOOLLEN, Sr."

The appellees, the defendants below, were the makers of the note

*To same effect. *Fisher v. Von Behren* (70 Ind. 19), 36 Am. Rep. 162, and note, 165.

in suit, and it was alleged in the complaint that the note was due and unpaid.

The cause, having been put at issue, was tried by a jury, and a general verdict was returned for the appellees, and with their general verdict the jury also returned their special findings on particular questions of fact, submitted to them by the parties, under the direction of the court. Over several motions of the appellant, in reference to the answers of the jury to interrogatories, and his motion for a new trial, and his exceptions saved, the court rendered judgment on the general verdict against the appellant for the appellees' costs.

In this court, the following decisions of the Circuit Court have been assigned, by the appellant, as errors : 1. In overruling his demurrer to the second paragraph of the appellees' answer ; and 2. In overruling his motion for a new trial.

The questions arising under these alleged errors, we will consider and decide in the order of their assignment. Before however we enter upon the consideration of any question presented by the record of this cause, it is due to the learned judge of the trial court that we should note the fact that the decisions below have not been sustained in this court by the appellees' counsel, by any brief, argument or citation of authorities ; so that if we should arrive at a different conclusion from that of the Circuit Court, upon the question presented for decision, it may properly be attributed, to some extent at least, to the neglect of the appellees in abandoning the case on and after its appeal, and in failing to inform us of the grounds of the rulings in their favor, and to sustain those rulings by argument and authority.

1. In the second paragraph of their answer, the appellees alleged, in substance, that on the 1st day of February, 1872, two persons, then to the appellees entirely unknown, appeared at the appellees' residence, one of them calling himself James B. Drake, and representing himself to be the patentee of a machine or contrivance called " Drake's Horse Hay-Fork and Hay-Carrier," and the other calling himself Charles Golden ; that the said persons then and there proposed and offered to appoint the appellees George and John Fhalor their agents to sell said contrivance ; that during the negotiations relating to such contract, nothing was said between said parties about a note, or the execution of a promissory note, by the appellees, to said Drake, or to any other person ; that when

Ruddell v. Fhalor.

said George and John should accept such agency, they were to sell said machines, and account to said Drake, and were to divide the profits with said Drake; that they were not called on or asked to sign any note or other obligation to pay money; that no note or obligation was either read or shown to the appellees, and if they signed the note in suit, or other obligation to pay money, they did so without knowing it, and if so, the said note, by the artifice and trickery of said Drake and Golden, was so hidden and disguised as that they could not discover or prevent, by the use of due diligence. Appellee Solomon said that he was a Pennsylvanian by birth, and was educated in the German language, and did not well understand the English language when spoken, and could not read the English language, and did not, and could not, read the said agreement mentioned; that said Drake pretended to read said agreement to him, but that as he afterward learned, he did not read it correctly; that in so reading, or pretending to read the same, he did not read of any note, or of any reference to a note or obligation to pay money, and the appellee Solomon did not know that said agreement made any mention or reference to a note till long after said note was in the appellant's hands; and that by the blandishments, flattery and persuasion of said Drake and Golden, and their representations that large profits could be made, said George and John were induced to accept the appointment of such agents, and then and there, upon the request of said Drake and Golden, said George and John signed a paper called an "agreement," accepting such agency, and on request said Solomon then signed said "agreement," as witness thereto, and for no other purpose, which paper the appellees were to and did keep and retain.

And the appellees said that said Golden and Drake represented to them that it would be necessary, right and proper for the appellees to sign said agreement in duplicate—that was, they should sign another paper just like the one they were to and did keep, in order, as said Drake and Golden represented, that they might have a copy to keep; that the appellees did put their names to another paper, which they in good faith believed was an exact copy of the agreement they were to keep, and nothing else; that the appellees then (at the time of filing their answer) feared and believed, that instead of having signed a copy of said agreement, they had, through the artifice, fraud and trickery of said Drake and Golden, put their names to the note in suit; but the appellees said, that if

they did sign said note, they did so unwittingly, without intending so to do, and were so procured so to do by said artifice, fraud and trickery, so adroitly done and performed by said Drake and Golden that the appellees could not detect or know it; and that if they did so sign said note, they never at any time delivered the note sued upon to said Drake and Golden, or to any other person or persons. Wherefore, etc.

We are of opinion that the facts stated in this second paragraph of answer were not sufficient to constitute a defense to the appellant's action, and that the court clearly erred in overruling his demurrer to said paragraph. The note in suit was payable at a bank in this State, and was therefore negotiable as an inland bill of exchange. The appellant was the owner and holder of the note, as the indorsee thereof before maturity, for value and without notice. Under the law merchant, which governs the negotiability of inland bills of exchange, and fixes and determines the rights and liabilities of the parties thereto, there can be no doubt, we think, that the appellant, as the indorsee of the note sued upon for value, before maturity and without notice, took such note free from all the equities and defenses which might have existed as between the appellees, as the makers, and the said James B. Drake, as the payee, of the said note. It was not alleged in said second paragraph of answer, that the appellant, at the time he became the owner, as indorsee of said note, had notice of any of the facts set forth in said paragraph as a defense to this action. Possibly the fact stated by the appellees, in said paragraph of answer, would have constituted a good defense in their behalf, if suit had been brought against them on the note by James B. Drake, the payee thereof; but however this might have been, it is very certain, as it seems to us, that those facts were not sufficient to constitute a valid defense in appellees' favor to the suit of the appellant on said note as the indorsee thereof. *Murphy v. Lucas*, 58 Ind. 360; *Cornell v. Nebeker*, id. 425; *Bremmerman v. Jennings*, 61 id. 334; *Maxwell v. Morehart*, 66 id. 301; *First Nat. Bank of Lawrenceburgh v. Lotton*, 67 id. 256; *Indiana Nat. Bank v. Weckerly*, id. 345; *Marshall v. Drescher*, 68 id. 359; *McCoy v. Lockwood*, 71 id. 319; *Zook v. Simonson*, 72 id. 83.

It will be seen, from the summary we have given of the facts alleged in the second paragraph of answer, that an effort was probably made to show thereby that the note in suit had been obtained

Ruddell v. Fhalor.

from the appellees without fault or negligence on their part, by and through the artifice, fraud and trickery of Drake, the payee of the note. But we think that the paragraph wholly fails to state or show any such case. The paragraph was the joint answer of the three makers of the note sued on, and while it was alleged that one of the makers had been educated in German, and could not read the English language, yet it may be fairly inferred from the silence of the paragraph on the subject, that the other two makers of the note had been educated in English, and could readily read the English language. It seems to us that the appellees were grossly negligent in confiding in "the blandishments, flattery and persuasion of said Drake and Golden," "who were entirely unknown" to the appellees; and it may be fairly inferred from the allegations of said paragraph of answer, that the appellees were probably induced to sign the papers presented to them by said Drake and Golden, without proper caution, as much or more by "their representations that large profits could be made" as by their "artifice, fraud and trickery." The case of *Nebeker v. Cutsinger*, 48 Ind. 436, is in point. In that case, it appeared that the maker of a note, payable at a bank in this State, had been induced, by the fraud and trickery of the payee, to sign his name to such note, when he in good faith believed that he was executing a paper of an entirely different kind, and had no intention to sign a note; and it was held that the maker of the note was liable to a *bona fide* indorsee thereof for value, if such maker was guilty of negligence in failing to use reasonable care to inform himself of the paper so signed by him. In such a case as the one at bar, we think the true doctrine is, that the makers of such a note as the one in suit, who by their carelessness or undue confidence, have enabled another to obtain the money of an innocent person, should answer the loss they have occasioned.

Upon the allegations of the second paragraph of the appellees' answer, which, no doubt, stated their defense in its strongest and most favorable light, we are of the opinion that the note in suit was obtained from them by and through their gross carelessness and undue confidence in strangers; that they thereby put it in the power of Drake, the payee of the note, on the faith of their names and credit, to obtain the money of innocent persons; and that as between them and the indorsees of their note before maturity, for value and without notice, they should be required to answer and bear the loss occasioned, or materially contributed to, by their own

Ruddell v. Fhalor.

folly and negligence. The appellant's demurrer to the second paragraph of answer ought to have been sustained, and to overrule it, as the court did, was clearly such error, we think, as requires the reversal of the judgment:

Our conclusion in regard to the insufficiency of this second paragraph of answer renders it unnecessary for us to consider now the questions arising under the alleged error of the court in overruling the motion for a new trial. The evidence is in the record, and without considering it at length, we may properly say that in our opinion, it utterly fails to sustain the general verdict of the jury; and for this cause a new trial ought to have been granted. We need hardly say, we think that the point in judgment in the case of *Zook v. Simonson, supra*, is not involved in or presented by the record of this cause.

The judgment is reversed, at the appellees' costs, and the cause is remanded with instructions to sustain the demurrer to the amended second paragraph of answer, and for further proceedings not inconsistent with this opinion.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
IOWA.

BARNETT V. NELSON.

(54 Iowa. 41.)

Mortgage—mortgages in possession—liability for use and repairs.

A mortgagee of real estate, in possession, is liable for the fair rental value of the premises without regard to the net profit, and is bound to keep them in ordinary repair.

FORECLOSURE. The opinion states the points. The plaintiff had judgment below.

Frank M. Davis and R. A. Moore, for appellant.

J. H. Maley and McPherson & Scott, for appellee.

DAY, J. [Omitting minor matters.] II. The appellant has assigned and argued numerous errors, but a few of which it will be necessary for us to consider in order to indicate our view of the entire case. The referee found that the rental value of the mill during the time plaintiff had possession, from May 1, 1874, to April 16, 1878, was \$1,200 per year. As a conclusion of law the referee found, however, that plaintiff, being a mortgagee in possession, should

account only for the net proceeds of the property. This conclusion was approved and confirmed by the court. In this, we think, the referee and the court erred. If the plaintiff had judiciously rented the premises to a third person he would have been chargeable only with the amount of rent received. But when the mortgagee himself goes into possession a different rule applies, because the net proceeds are known only to the mortgagee. And in such case he must account for the reasonable rental value of the premises. In *Sanders v. Wilson*, 34 Vt. 318, it is said: "When the mortgagee himself occupies, and especially when the premises are a farm in cultivation, upon which labor and expenditure are to be bestowed to produce annual crops and profits, the mortgagee will be charged with such sums as will be a fair rent of the premises, without regard to what he may, in fact, have realized as profits from the use of it. The rule is founded in sound policy, for the reason that the particular items of expenditure, in labor or otherwise, as well as the profits received, are wholly within the knowledge of the mortgagee, and if he is not disposed to render a full and honest account it would be impossible for the mortgagor to show them, or to establish errors in the mortgagee's account." To same effect see, also, 1 Hill. on Mort., ch. 16, § 3; Daniel's Ch. Pr. (4th ed.) 2223; Washb. Real Prop. 578; *Gordon v. Lewis*, 2 Sumn. 143; *Kellogg v. Rockwell*, 19 Conn. 446; *Trimpston v. Hamill*, 1 Ball & B. 379; *Bainbridge v. Owen*, 2 J. J. Marsh, 465; *Van Buren v. Olmstead*, 5 Paige, 9; *Strong v. Blbanchard*, 4 Allen, 538. The authorities cited by appellee, properly understood, do not recognize a contrary doctrine.

[Minor point omitted.]

IV. The referee found the following fact: "The mill has been suffered to run down since April, 1874, for the want of proper care and necessary repairs, and is now in bad condition, and I find the damage to mill for want of ordinary care and repairs to be \$1,000; and I further find in this connection that Barnett treated the mill as his own property and was not guilty of any fraud or gross carelessness in the management thereof."

The report of the referee and the judgment of the court do not charge the plaintiff with the damage to the mill. In this, we think, there was error. It was the duty of the plaintiff to take proper care of the premises, and to apply the proceeds, so far as necessary, to the making of repairs necessary for the prevention of damage to the property. As he was deriving a profit from the premises, and was

Davis v. Clinton Water Works Co. Jones v. Brown.

not in possession for the mere accommodation of the owner, it was his duty to exercise reasonable diligence, and take ordinary care of the property. He cannot be exonerated from liability because he was not guilty of fraud or gross carelessness.

[Omitting other matters.]

Reversed.

DAVIS V. CLINTON WATER WORKS CO.

(54 Iowa, 59.)

Negligence — want of priority of contract.

A water company, contracting to supply a city and failing to keep its contract, is not liable to a citizen suffering damage by fire, which the city, in consequence of such breach of contract, was unable to extinguish.

THE opinion is sufficiently reported in note, 33 Am. Rep. 5.

JONES V. BROWN.

(54 Iowa, 74.)

Judge — arbitrator — civil liability for corrupt action.

An arbitrator is not liable in an action for damages for a corrupt and fraudulent award. (See note, p. 188.)

ACTION on bond to pay arbitrator's compensation. The opinion states the point. The plaintiff had judgment below.

Rickel, West and Eastman, for appellant.

Mills & Keeler, for appellee.

ROTHROCK, J. I. The demurrer having been overruled as to the answer in defense of the plaintiff's action, and sustained as to the counterclaims, the questions presented are to be considered in the same light as though the defendant was plaintiff in an action seeking to recover damages of Jones, one of the arbitrators, for the

alleged corrupt and fraudulent acts set forth in the counter-claims. It will be observed that the defendant first claims damages for the alleged corrupt acts and practices of which the plaintiff was guilty during the hearing before the arbitrators, and up to the filing of the award in the District Court. One of the grounds of the demurrer is that the arbitrators were acting as a court, and in a judicial capacity, in hearing and determining the matters of difference between Brown and Harper, and that having jurisdiction of the subject-matter and of the persons interested in the investigation, they cannot be held civilly liable even though it be alleged that they acted fraudulently and corruptly. To this question counsel have mainly directed their arguments.

Before proceeding to a disposition of the main question one or two considerations of minor importance demand attention. Counsel for appellant insists as the arbitrators adjourned, and without again meeting made up their award, they acted in a mere ministerial capacity, and not as a court, nor as judicial officers. This position does not appear to us to be correct. The arbitrators, in determining the time and manner of making and filing their award, acted in the same capacity that they did in determining what their award should contain. As well might it be claimed that a judge acts in a mere ministerial capacity in reducing an opinion to writing, and thus hold him liable civilly upon the ground that such act was not judicial.

It does not seem to be seriously contended that arbitrators of matters of difference between parties do not act in a judicial capacity. That they are in a certain sense a court cannot be questioned. They are empowered to determine questions of law and fact; in short, to adjudicate all questions presented to them by the parties, and to determine the rights of the parties. The fact that their award may be subject to review by the court to which it is required to be returned does not divest them of judicial functions.

Having determined these preliminary questions, we come to the main question in the case. It is this: Can the plaintiff be held liable in a civil action for damages for an award alleged to have been made by him fraudulently and corruptly? Perhaps no branch of the law has undergone more thorough discussion than the question as to the liability of judges to civil actions for their judicial acts. The cases which treat of the subject are so numerous, both in England and in this country, that it is impracticable to more

than refer to them generally. In the case of *Yates v. Lansing*, 5 Johns. 282, there is an elaborate review of the authorities upon the subject. In a note to *Busteed v. Parsons*, 25 Am. Rep. 694, we have the substance of a large number of cases, English and American. See, also, *Bradley v. Fisher*, 13 Wall. 335; and in the late case of *Lange v. Benedict*, 73 N. Y. 12; s. c., 29 Am. Rep. 80, very many authorities are reviewed and commented upon. By these authorities it is settled beyond all controversy that a judge of any court, whether of limited or general jurisdiction, is not liable in a civil action for acts done in his judicial capacity, and within his jurisdiction, even though it be alleged that the acts complained of were done maliciously and corruptly. In *Pratt v. Gardner*, 2 Cush. 68, Chief Justice SHAW said: "It is a principle lying at the foundation of all well-ordered jurisprudence, that every judge, whether of a higher or lower court, exercising the jurisdiction vested in him by law, and deciding upon the rights of others, should act upon his own free, unbiased convictions, uninfluenced by any apprehension of consequences," etc.

In some of the cases, as in *Bradley v. Fisher*, 13 Wall. 335, it is held that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly; and a distinction is made between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. In other cases it is held that judges of courts of limited jurisdiction are liable to civil actions for their acts done in excess of their jurisdiction. It is unnecessary however that we should discuss these distinctions in considering the question presented by the first counter-claim in the case at bar, because it is apparent that the arbitrators had jurisdiction both of the subject-matter and of the persons of the parties interested, and no act set forth in said counter-claim was in excess of their jurisdiction. Jurisdiction is defined to be "the authority of law to act officially in the matter then in hand." Cooley on Torts, 417. That the arbitrators in this case had jurisdiction to do all that is alleged they did in the counter-claim under consideration is apparent; that is, they had jurisdiction to hear, try and determine and make an award. That they did not act in excess of their jurisdiction is also apparent. Orders or judgments in excess of jurisdiction are such as the judge has no power to make, as where a judge having juris-

diction of a criminal offense inflicts a penalty in excess of that provided by law, or the like. The arbitrators in this case had power to make an award. The means employed by them, and the manner in which the proceedings before them were conducted, may have been irregular, but were not in excess of their jurisdiction.

Counsel for appellant rely upon *Gowing v. Gowing*, 12 Iowa, 495, as holding that a justice of the peace is liable for acts done in a judicial capacity through fraud, favor or partiality. That was an action against a justice of the peace for fraudulently hearing and determining a case at 10 o'clock in the forenoon upon an original notice which required an appearance at 1 o'clock P. M. The opinion, without any decision as to the question of whether the justice acted without jurisdiction, concludes that he was liable for his fraudulent and corrupt acts. The decision might well have placed the liability upon what all the cases concede to be proper ground, and that is, a clear absence of jurisdiction. The original notice was returnable at one o'clock in the afternoon, and until that time the justice had no jurisdiction of the parties. Whatever may be said of the reasons given for that opinion, it does not seem to have been regarded in the subsequent decisions of this court as holding that when a judge of a court has jurisdiction he is liable in a civil action for his judicial acts. *Wasson v. Mitchell*, 18 Iowa, 153, and *Londegan v. Hammer*, 30 id. 155.

[Minor considerations omitted.]

Affirmed.

NOTE BY THE REPORTER. — This action came before the court subsequently, sub nom. *Bever v. Brown*, Oct. 5, 1881. The court said: "When this case was before us on a former appeal it was held that a demurrer to a counter-claim for damages, alleging the same facts as those now relied upon as a defense, was properly sustained. See *Jones v. Brown*, 34 Iowa, 74. It was held that the arbitrators acted in a judicial capacity, and could not be held liable in a civil action for damages for an award, although alleged to have been made fraudulently and corruptly. It is but a corollary of this decision that the claim of the arbitrators for compensation for their services cannot be recouped by damages to the extent of the claim for making a fraudulent and corrupt award. But we have now involved in the case a different question. The answer alleges that because of the wrongful and illegal acts of the arbitrators the award by them made was by order of the court resubmitted, and the finding of the arbitrators was void and of no value, and the services of the plaintiff were useless and of no effect. The answer does not seek to recoup the plaintiff's claim with damages, but alleges a want of consideration growing out of the fact that the services of the plaintiff, owing to his misconduct, were useless and of no value. We have now the question whether the rule of judicial immunity which protects an arbitrator from liability for damages for a fraudulent and corrupt award goes also to the extent of inhibiting all proof that the award was valueless on account of the corrupt and willful misconduct of the arbitrator, for the purpose of defeating the arbitrator's claim for compensation for his services. In this case the arbitrators made an agreement with the parties to the suit for compensation at the rate of \$10 per day. Now, while the

Whiting v. Story County.

arbitrators did not contract for the possession of perfect judgment, and did not undertake to make an award which should be sustained by the court, there was, we think, an implied undertaking that they would not by their corrupt and fraudulent practices render their award valueless to the parties. We think that the rule of judicial immunity goes far enough when it protects the arbitrators from an action for damages, without allowing them compensation for an act rendered useless by their willful misconduct. This seems to have been the view originally entertained by the court below, for while it sustained a demurrer to the counter-claim for damages, it overruled a demurrer to the answer, which set up the same facts as a defense to the plaintiff's claim. When the case came on for hearing however the court rejected all evidence offered by the defendants, and instructed the jury to return a verdict for the plaintiff for the amount claimed." [After stating the evidence offered.] "This proof should have been admitted for the purpose of showing that the award was rendered unavailing to the parties through misconduct of the arbitrators."

Rates v. Stinson, 50 Tex. 495; s. c., 38 Am. Rep. 609, is to the same effect as the principal case.

WHITING V. STORY COUNTY.

(54 Iowa, 81.)

Municipal corporation — mechanic's lien.

A court-house is not subject to a mechanic's lien.*

ACTION to establish mechanics' liens on a county court-house.
The plaintiffs had judgment below.

T. D. Thompson and *L. Irwin*, for appellant.

John A. McCall, for appellees Whiting & Keemer.

Hubbard & Clark, for appellees Green and Godson.

DAY, J. The point involved in this case was determined adversely to the position of appellees in *Loring v. Small*, 50 Iowa, 271; s. c., 32 Am. Rep. 136. The earnest and able argument of appellee's counsel has not convinced us that the decision in that case is not correct. It is claimed that the mechanic's lien law is general, applying to all buildings alike. So is § 3048 of the Code, exempting public buildings owned by the State, or any county, city, school district, or other municipal corporation, from execution. The only mode provided for the enforcement of a mechanic's lien is the sale under execution of the property against which the lien

* See *Curry v. Mayor, etc.*, ante, 74.

Burnett v. Gustafson.

is asserted. It follows, that in the case of the public buildings named, one or the other of these general statutes must yield. Both cannot be enforced. What then is the proper rule of construction? The mechanic's lien law specifies no distinct class of buildings, but applies generally to all. Section 3048 refers to a particular class of buildings. It says that as to them the incident of a mechanic's lien which gives it all its effectiveness, an execution shall not apply. The effect of this provision is to withdraw this class of buildings out of, and to remove it from, the general provision. The general yields to the particular. Such was the construction placed upon a similar statute in the case made the basis of our opinion in *Loring v. Small, supra*. That this is the correct construction we feel well satisfied. See, also, *Williams v. Controllers*, 18 Penn. St. 275; *Ripley v. Board of County Com.*, 3 Neb. 397; *McPheeters v. Merrimac Bridge Co.*, 28 Mo. 465; *Abercrombie v. Ely*, 60 id. 23; *Dunn v. North Missouri Railroad*, 24 id. 493; *Thomas v. Board of Education*, 71 Ill. 283; *Board of Education v. Neidenberger*, 78 id. 58.

II. It is claimed, however, that if no execution can be issued against the property of the defendant, still a judgment may be rendered, to be enforced in the usual way by the levy of a tax for its satisfaction. But the lien of the mechanic is purely a creature of statute. It has been uniformly held by this court that it can be enforced only in the manner prescribed by the statute. This claim was made in *Loring v. Small, supra*, and in *Benton v. Board of Supervisors of McDonough County* (Cent. Law Jour., vol. 5, pp. 105 - 8), and it was in both cases held that it could not be allowed. We see no reason for departing from our former decision on this question.

Reversed.

BURNETT V. GUSTAFSON.

(54 Iowa, 86.)

Trust — receipt of proceeds of mortgaged chattels for debt.

The owner of mortgaged cattle sold them, and with the proceeds paid his debt to a bank, in another county, where the mortgage was not filed, the cashier having no knowledge of the circumstances except that the money arose from a sale of cattle. *Held*, that the bank was not liable to the holder of the mortgage for the proceeds.*

*Compare *Stephens v. Bd. of Ed. of City of Brooklyn* (79 N. Y. 183), 35 Am. Rep. 511.

Burnett v. Gustafson.

GARNISHMENT proceeding. The opinion states the facts. The defendant had judgment below.

O'Connell & Springer, for appellant.

John F. Duncombe, for appellees.

DAY, J. I. On the 13th day of May, 1876, John E. Gustafson, to secure the debt sued upon, executed to the plaintiff a chattel mortgage upon property described as follows: "Sixty head of cattle; forty-five three years old, and fifteen two years old, steers."

This mortgage was recorded in Webster county on the 16th day of May, 1876. About the same time the defendant Gustafson was indebted to the bank in the sum of \$2,200, a portion of which debt had been renewed from time to time. At the date of the last renewal of a note of \$1,000, Gustafson promised that he would pay it when he sold his cattle. On the 10th day of January, 1877, Gustafson sold, in Chicago, thirty-seven of the three year olds described in the mortgage, and received therefor a little over one thousand dollars. The defendant Gustafson deposited this sum in a bank in Chicago to the credit of the First National Bank of Boone. On the 11th day of January the defendant bank received notice of this deposit, and placed it to the credit of Gustafson in the bank. On the 29th of January, when a note of \$1,000 matured, Gustafson came to the bank and requested a further renewal. He was then reminded of his promise at the time the former renewal was made. The money was then, with the consent of Gustafson, applied to the payment of the one-thousand dollar note, and the note was surrendered.

From the time of the execution of the mortgage till the sale of the cattle they remained in Webster county, with the exception of five months when they were in Greene county. The cattle were never in the possession of the plaintiff. The bank had no knowledge of the existence of the mortgage until after the satisfaction of the debt, and the surrender of the note. The cashier who conducted the business for the bank supposed that the fund arose from the sale of Gustafson's cattle, but he had no actual knowledge of that fact. Under the circumstances, we think the bank cannot be treated as a trustee of the fund. If the bank had bought the cattle of Gustafson, then, if the description in the mortgage is sufficiently explicit, the record of the mortgage would have furnished

State v. Smith.

the bank constructive notice of the plaintiff's rights. But when the bank simply received a fund, which it supposed arose from a sale of cattle, without any suspicion that a mortgage existed upon the cattle, it was under no obligation to examine the records in another county for the purpose of ascertaining whether a mortgage upon the cattle was on record. It would greatly embarrass commercial transactions, if a party could not safely receive the proceeds of personal property without first examining the records of the one hundred counties in the State, to see whether any mortgage upon the property is recorded. The party receiving the proceeds of such property has a right to presume that the sale was proper, or if not, that the party entitled to the lien will pursue the property itself, and not its proceeds. If the fact of the existence of the mortgage was known, and the identical proceeds could be traced, a different question might arise.

II. It is claimed that the bank must account for the money, because it received it in payment of a pre-existing debt. Whatever may be regarded as the proper rule respecting the transfer of other property in payment of existing debts, it cannot be denied that the receipt of money in that manner is in accord with the usual custom of business. A want of *bona fides* cannot be attributed to the party who surrenders the evidence of an existing debt, in consideration of money paid.

Affirmed.

STATE V. SMITH.

(64 Iowa, 104.)

Criminal law — evidence — bastardy — exhibition of child to jury.

In bastardy proceedings, the public prosecutor exhibited to the jury the child, two years and a month old, and commented on the resemblance to the defendant. *Held* no error, especially when the court instructed the jury that if they did not see the resemblance they should disregard the comments.

BASTARDY proceedings. The head note sufficiently states the facts. The defendant was convicted.

Murdock & Larkin, for appellant.

Cyrus Wellington, for State.

State v. Smith.

ADAMS, C. J. I. The child in this case was two years and one month old. The defendant claims that any resemblance, if it should be shown to exist, between such a child and a man alleged to be its father, is too unreliable to constitute legal evidence of the alleged paternity.

It is a well-known fact that resemblances often exist between persons who are not related, and are wanting between persons who are. Still, what is called family resemblance is sometimes so marked as scarcely to admit of a mistake. We are of the opinion, therefore, that a child of the proper age may be exhibited to a jury as evidence of alleged paternity.

Precisely what should be deemed the proper age we need not determine. It was held in *State v. Danforth*, 48 Iowa, 43; s. c., 30 Am. Rep. 387, that it was error to allow a child three months old to be exhibited. That case is relied upon by the defendant in this. But a child that is only three months old has that peculiar immaturity of features which characterizes an infant during the time that it is called a babe. A child two years old or more has, to a large extent, put off that peculiar immaturity.

In allowing a child of that age to be exhibited, we think the court did not err, especially under the distinction given, to which we shall hereafter refer.

II. It is claimed by the defendant that the statement of the counsel for the State, wherein he called attention to an alleged point of resemblance, was improper and should not have been allowed.

While we think that the court might properly have excluded such statement, we are unable to conclude that the defendant was prejudiced by it. A resemblance so recondite as to call for demonstration must, we think, have impressed the jury as not very reliable; besides the court instructed the jury that if they did not clearly see such resemblance, they should disregard all claims of resemblance on the part of the State.

In our opinion the judgment must be affirmed.

Judgment affirmed.

SHAVER V. SHAVER.

(54 Iowa, 208.)

Trade-mark — "Shaver wagon, Eldora."

The plaintiff had for several years made wagons at Eldora, and painted on them in one general style the words "Shaver wagon, Eldora." The defendant, his brother, had been his employee, and later his partner in that business. The firm was dissolved, and the plaintiff acquired its property and continued the business. Two years after the defendant set up the same business in the same town, and painted the same words on his wagons, in the plaintiff's general style, but with slight changes in form, and adding his own initials. The resemblance was calculated to deceive the public. *Held*, that the defendant should be restrained.

SUIT to enjoin the use of trade-mark. The opinion states the case. The plaintiff had judgment below.

E. W. Eastman, W. V. Allen and Brown & Binford, for appellants.

Porter & Moir and Huff & Reed, for appellee.

BECK, J. I. Counsel for defendants maintain that the right to the exclusive use of a trade-mark by the person first adopting it is not recognized by the common law, and that in the absence of statutes the courts will not afford relief to the person injured by awarding damages for the unauthorized use of the trade-mark, or restrain by injunction such use. The position finds no support in the books. For three hundred years the common law has recognized the right of the proprietor of a trade-mark to its exclusive use, and has awarded damages for the deprivation of such use. *Southern v. How*, Popham, 143-4.

The right has been, without interruption, recognized and protected by the courts of England and the United States from that day to the present, in the absence of statutes declaring the existence of such right, or providing regulations for its exercise and remedies for its deprivation. Many cases involving the subject have been decided by the courts. They are too numerous to be cited here. For a collection thereof see *American Trade-mark Cases*, by Rowland Cox.

Shaver v. Shaver.

The jurisdiction of chancery to restrain the use of a trade-mark, without the consent of the proprietor, was first recognized at a later day. In 1742 Lord HARDWICKE denied it (*Blanchard v. Hill*, 2 Atk. 484), but within the last fifty years it has been repeatedly exercised in England and in this country. I have not found an American case denying it.

It has been expressly held that the right to the exclusive use of a trade-mark, where statutes exist regulating and protecting it, does not depend upon such statutes. *Derringer v. Plate*, 29 Cal. 292; *Filley v. Fassett*, 44 Mo. 173.

Using the language of AMES, C. J., in *Barrows v. Knight*, 6 R. L. 434, we conclude that "it never could have been a question that a designed imitation by the defendant of the trade-mark of the plaintiff, whereby the former fraudulently passed off his goods in the market as goods manufactured by the latter, and to his injury, would support an action."

We may express with equal positiveness the conviction that the rule is firmly settled that chancery will in a proper case by injunction protect the proprietor of a trade-mark in its exclusive use.

II. Chancery affords protection to the exclusive use of a trade-mark upon the ground of the injury sustained by the proprietor when it is appropriated by another, and of the fraud and deception practiced upon the public. The law will never fail to protect a citizen in the enjoyment of the fruits of his industry and enterprise. When through these he has acquired a reputation which brings him trade and patronage, he is entitled to its benefits as fully as to the enjoyment of property acquired in the same manner. The means and instruments he adopts to indicate to the public his place of business and the goods he manufactures and sells, whereby trade is acquired, cannot be appropriated by another. The people who have bought his goods and given him patronage, or who have a knowledge of the reputation he has acquired in his business, and therefore desire to purchase the articles he manufactures or sells, ought not to be deceived and induced by fraud to trade with another. Chancery will restrain the injury to the trader and public by such fraudulent acts.

III. We will briefly state certain principles and rules pertaining to the subject of trade-marks, which in our opinion are applicable to the case before us.

A trade-mark is a name, sign, symbol, mark, brand or device of

any kind, used to designate the goods manufactured or sold, or the place of business of the manufacturer or dealer in such goods. The exclusive right in a trade-mark is acquired by its use, which the law does not require shall be continued for any prescribed time.

IV. The trade-mark is often intended to indicate the quality of the goods, and it is unlawful to appropriate it to indicate goods of a quality equal to those manufactured or sold by its proprietor. *Taylor v. Carpenter*, 11 Pai. 292; *Coats v. Holbrook*, 2 Sandf. Ch. 586.

V. The use of a trade mark ignorantly or innocently, with no intention to defraud or deceive the proprietor or the public, will be restrained by chancery. *Millington v. Fox*, 3 Myl. & Cr. 338; *Cartier v. Carlile*, 31 Beav. 292.

VI. In order to authorize the interference of chancery, it is not necessary that the trade mark should be copied with the fullest accuracy. An imitation which varies from the original, in some particulars, will be restrained. The rule is, that if the imitation is calculated to deceive and may be taken for the original, its use will be restrained. *Filley v. Fassett*, 44 Mo. 173; *Boardman v. Meriden Britannia Co.*, 35 Conn. 402; *Falkinburg v. Lucy*, 35 Cal. 52; *Woodward v. Lazar*, 21 id. 448; *Seixo v. Proevzende*, L. R., 1 Ch. App. 192; *Witherspoon v. Carrie*, L. R., 5 Eng. and Irish App. 508; *Bradley v. Norton*, 33 Conn. 157; *Davis v. Lendall*, 2 R. I. 566.

In support of the doctrines we have above stated, see the cases cited in the notes in 2 Hill. on Torts, p. Ch. 2, *et seq.*; 2 Story Eq. Jur. (11th ed.), § 951; High on Injunctions, ch. 16; Addison on Torts (4th ed.), 874 *et seq.*, and many decisions collected in American trade mark cases, by Rowland Cox.

VII. We are now required to determine the facts of the case before us, which we find to be as follows: The plaintiff has been for many years engaged in the manufacture of wagons at Eldora. His business has never been extensive, and his sales are largely confined to the county in which he lives. The business, for a time, was prosecuted by copartnerships composed of plaintiff and the defendants, his brothers, and another person. Upon the dissolution of these copartnerships, plaintiff continued the business and acquired all the property of the firm. For several years the plaintiff conducted the business on his own account, and sometime before his brothers commenced business for themselves, they had been employed by plaintiff. In 1874, plaintiff adopted as a trade mark the words, "Shaver Wagon, Eldora," which was at first, with some

Shaver v. Shaver.

variation in form, painted conspicuously on all wagons manufactured and sold by him. He adhered to a general style of work and painting, and his trade mark for the last few years has been painted upon his wagon in substantially the same form and manner. The defendants, more than two years after they ceased to be copartners of plaintiff, commenced the manufacture of wagons and painted thereon the identical words used as a trade mark by plaintiff. They changed somewhat the form of inscribing the words, and painted their own initials near the trade mark. The wagons in general style, and in painting, resembled those manufactured by plaintiff, and were not inferior thereto. They did but little at the business before this suit was commenced, constructing and selling but one or two wagons.

We are clearly of the opinion that the trade mark of plaintiff is used by defendants with so little variation that their wagons would be readily taken to be of the manufacture of plaintiff. The imitation used by defendants we have no doubt is calculated to deceive customers, and thus defraud them and injure and defraud plaintiff. Applying the doctrines we have above announced, we are of the opinion plaintiff has made out a case calling for the interposition of the power of equity to enjoin defendants from the further use of his trade mark.

VIII. It is said that plaintiff is not entitled to the relief he claims, for the reason that defendants, before the suit was commenced, had made but one or two wagons. But this objection is completely answered by the consideration that defendants, in their pleadings, admit the use of the trade mark, in the manner we have above stated, and as we understand the records, have continued to use it since the suit was commenced, and claim that they have a right so to do. They propose to continue its use. Under these circumstances, equity will restrain their further use of plaintiff's trade mark.

IX. The court below excluded evidence offered by defendants tending to establish the following facts: That the "scroll work" upon which plaintiff caused his trade mark to be painted, was generally used in painting wagons; that plaintiff had never called the words, "Shaver Wagons, Eldora," his trade mark, and had not instructed his partner to put it on; that the wagon sold by defendants was disposed of without regard to the trade mark," that the painting of defendant's wagons is readily distinguishable from that

Pyne v. Chicago, Burlington and Quincy Railroad Company.

of plaintiffs, and that they are different in size ; that defendant's wagons were not sold because of any notoriety on account of the trade mark, and that defendants had not sought to increase their sales by means of the trade mark.

When it is remembered that the gist of the action is the use of plaintiff's trade mark and not the imitation of the wagons he constructed ; that no formal act or declaration is necessary in order to adopt a trade mark, which rests upon use alone ; that if defendants, without fraud and innocently, used plaintiff's trade mark ; when these things are remembered, it will be readily seen that the proposed evidence was correctly excluded. It may be further remarked, that if defendants honestly expected no advantage in the sale of their wagons by the use of the trade mark, they would not have attempted to appropriate it, and would not tenaciously cling to its use at the expense of a lawsuit. If as they say, it is a matter of so little importance, they have acted a very unwise part in incurring so much expense in efforts to establish their right to use plaintiff's trade mark.

In our opinion, the decree of the court below is in accord with the law and facts of the case. It is therefore affirmed.

Judgment affirmed.

PYNE V. CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

(54 Iowa, 223.)

Statutory construction — negligence — co-servant — detective and engineer.

Under a statute making railroad companies liable to their employees for injuries sustained by them by the negligence of their other employees, a railroad company is liable for an injury suffered by a detective in its employ, while in the discharge of his duty, through the negligence of an engineer on a passenger train.

ACTION of damages for personal injuries. The opinion states the case. The defendant had judgment below.

H. W. Maxwell and A. R. Smalley, for appellant

Stuart Brothers, for appellee.

Pyne v. Chicago, Burlington and Quincy Railroad Company.

ROTHROCK, J. I. The plaintiff was co-employee with the engineer by whose negligence it is alleged he was injured. They were both engaged in the same general business under one employer or master, and at common law neither could recover of the employer for an injury occasioned by the negligence of the other. *Sullivan v. M. & M. R. Co.*, 11 Iowa 421; *Peterson v. Whitebreast Coal & Mining Co.*, 50 id. 673. The fact that one was a detective and the other a train man, and that they were thus engaged in different branches of the common service, can make no difference in the rights of the parties. For a full discussion of this question see the first case above cited, and the authorities there referred to.

II. Section 1307 of the Code is as follows: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the willful wrongs, whether of commission or omission of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

The first act of the legislature making railroad companies liable for damages sustained by employees, in consequence of the negligence or co-employees, was enacted in 1862. Its provisions, so far as the question of liability and the character of the service of the employee are involved, were substantially the same as section 1307 of the code. It has uniformly been held by this court that in order to maintain an action under these statutes it must appear that the duties of the employee were such as to expose him to the perils and hazards of the business of railroad companies. *Deppe v. Chicago, Rock Island & Pacific Railroad Co.*, 36 Iowa, 52; *Fransden v. Same*, 36 id. 372; *Schröder v. Same*, 41 id. 344; *Potter v. Same*, 46 id. 399.

Tested by the rule of these cases, is the plaintiff, by the averments of his petition, accepting them as true, entitled to recover?

By an examination of the cases it will be seen that the statute is not construed to mean that actions can be maintained by train men only, or by men whose employment is such, or pertains to the running of trains. In the *Deppe* case it was held that an employee engaged in connection with a dirt train, and who was injured while loading a car, by the falling of an impending bank, could maintain

Pyne v. Chicago, Burlington and Quincy Railroad Company.

an action by showing negligence. The court said: "It is true he was not injured while, or by, operating the train, but neither the act itself nor the constitutional limitation requires us to put this very narrow construction upon it. * * * . The ground we rest our affirmance upon is that when the employment is entire, and a part of the continuous services relates to the perilous business of railroading, it brings the case within the statute and its constitutional limit."

In the *Fransden* case it was held that a person employed as a section hand, whose duty it was with others to keep a certain part of the railroad in repair, and to go with them on the track in a hand-car for that purpose, was within the statute making railroad companies liable to their employees for injuries resulting from negligence of co-employees. That was an action for injuries received by reason of the negligence of the section boss in failing to remove a hand-car from the track, by reason of which plaintiff was injured by an approaching train.

In the case of *Schrøder* the plaintiff was engaged in removing an abandoned bridge; and it was averred in the answer that his employment was not in any way connected with operating the road, and that he received his injuries by voluntarily, and not in pursuance of any duty, going upon a car loaded with timbers from the bridge, some of which fell from the car and injured him. A demurrer to the answer was sustained. It was held that the demurrer should have been overruled. This court said: "The services of the persons claiming compensation under the provision (Code, § 1307), must be connected with the use and operation of the railroads. Corporations owning and operating railways may engage in other business, which may be within the scope of the objects of their organization, yet not at all, or very remotely, connected with the use of their roads. In such cases employees by whom such affairs are conducted acquire no rights under this statute. Their occupation does not expose them to the hazards incident to the use of railways."

In *Potter C. R. I. & P. R. Co.*, the plaintiff was an employee in a machine shop, and was injured by a driving wheel of a locomotive engine falling upon him while the plaintiff and other employees were moving it by hand. It was held that the employment was in no way connected with the operation of the road; that plaintiff's duty as an employee did not expose him to the hazards

Pyne v. Chicago, Burlington and Quincy Railroad Company.

incident to the operation of railways, and that he could not recover.

It will be observed that there is language in some of the cases which seems to imply that the statute embraces only those who are engaged in the actual operation of a railroad in running the trains. But that the right of action is not thus limited is apparent. Trackmen, switch tenders and others whose duty requires them to be upon the track, are more or less exposed to the hazards of the business of railroading, and such employees when injured by the use or operation of the road, and by the negligence of co-employees, are as plainly within the provisions of the statutes as those whose duty requires them to assist in the running of trains. We think the proper test in determining the question is, does the duty of the employee require him to perform service which exposes him to hazard peculiar to the business of using and operating a railroad? If it does, and if while in the line of his duty he by the negligence of a co-employee receives an injury, from a passing train or from other appliances used in the use and operation of the road, he may recover.

It remains to be determined whether the plaintiff, by the averments of his petition, comes within these rules. He avers that he was acting under the immediate direction and instruction of the defendant, by its agent Wood; that he was directed to walk along on the track of the road to a house by the roadside; that as he was walking along on said track, in obedience to his instructions, he was from sunstroke or some other cause prostrated upon the track in an insensible condition; and that while in that condition he was injured by the engineer of a passing train negligently running the train upon him. These allegations must be accepted as true, however incredible they may appear. It is not for the defendant to say that the plaintiff's duty did not require him to walk upon the track, because it is averred that the defendant by its agent directed him to walk there. If this was an absurd or foolish order, or if it was attended with seemingly unnecessary danger, it was not in itself negligence in the plaintiff to obey the direction given to him. *Fransden v. C., R. I. & P. R. Co., supra.*

If a track-walker, whose duty it is to patrol a track in the night, should be prostrated by apoplexy or the like, and the engineer of a passing train should negligently run upon and injure him, there can be no doubt he would have a right of action. The case at bar

Haines v. Lewis.

presents the same state of facts, with the exception that probably a track-walker could not properly perform his duty without walking between the rails. The plaintiff might have performed his duty as a detective without walking upon the track, but the averment is that the defendant required him to do so, and we must accept that averment as the truth, for the purposes of this appeal.

We think the demurrer should have been overruled.

Reversed.

HAINES V. LEWIS.

(54 Iowa, 301.)

Contract — illegal — compromise of crime.

An agreement by one under sentence for crime, to deliver notes and money to the prosecuting witness on condition of his signing a petition for pardon, and the granting of such petition, or a subsequent discharge on a new trial, is void. (*See note, p. 203.*)

ACTION on a note and for money had and received. The head-note and opinion show the facts. The plaintiff had judgment below.

John F. Lacey, for appellant.

Haines & Lyman, for themselves, appellees.

ADAMS, C. J. I. The plaintiffs' action is based upon an alleged agreement upon the part of the defendant to deliver to them the two notes made payable to them and placed in defendant's hands. With whom such agreement was made does not appear from the petition. If it was made solely between Danforth and the defendant, then the defendant was solely Danforth's agent or bailee, and the delivery by Danforth to his own agent or bailee was not such delivery as would put the notes in force.

But if the petition had averred an agreement between the defendant and plaintiffs, they would still not be entitled to recover, unless the agreement was of such a character that we could properly enforce it.

The defendant insists that we cannot, for the reason that it would be against public policy to do so.

Haines v. Lewis.

It is the right of the State to have the unbiased testimony of all its witnesses in every criminal prosecution. If the tendency of such agreement would be to defeat such right, it cannot be upheld.

All the notes, including those made payable to the plaintiffs, were executed for the benefit of Ellen Patterson, the prosecuting witness in the criminal case. From the time they were executed and deposited she had a direct pecuniary interest not only in securing Danforth's pardon, but in case that was refused, and the case was reversed and remanded for another trial, in securing his acquittal. From most criminal acts there arises a civil liability, and the person injured is often the prosecuting witness. If the prosecuting witness and defendant can stipulate for the deposit of promissory notes or other property by the defendant, to be delivered to the prosecuting witness in settlement of the civil liability in case the defendant escapes conviction, and not otherwise, and the courts will enforce such stipulations, it appears to us that such would become a favorite arrangement upon the part of the injured person to enforce the discharge of the civil liability, and upon the part of the defendant to defeat the administration of criminal justice.

In this case, it is true that there had already been a conviction, and it was hoped that a pardon would be secured, but the possibility of a failure to secure the pardon, and of a reversal by the Supreme Court, and another trial below, we think, must have been contemplated by Danforth, and constituted a part of his motive in executing and depositing the notes. The well-known high character of the plaintiffs precludes us from supposing that they deliberately lent themselves to a scheme to defeat the administration of criminal justice in order to secure a private advantage. It seems probable to us that in their minds their private advantage was conditioned merely upon the contingency of Danforth's escape from imprisonment. But no honesty of intention upon their part would justify us in adopting a rule which would allow persons charged with crime to practically buy up the witnesses for the State.

In our opinion the judgment of the Circuit Court must be reversed.

Judgment reversed.

NOTE BY THE REPORTER. — Several contemporaneous cases may be stated in connection with this. In *Heckman v. Swartz*, 50 Wis. 267, by duress of imprisonment on a criminal charge, with threats of future prosecution if a certain sum of money be not paid him, and promise to dismiss the prosecution on such payment being made, A. induces B. to procure for him negotiable promissory notes for said sum from X., a friend of B., and then causes the prosecution to be dismissed and B. discharged. B. thereupon gives X. his

Haines v. Lewis.

(B.'s) own notes, secured by mortgage, for the same amount, and X. pays his notes to A. when due. B. is not guilty of said offense. The complaint against him fails to charge him with any offense, the warrant on which he was arrested is void on its face, and both complaint and warrant are colorable only. *Held*, (1) that even if a felony had been charged and committed, the act of X., in giving such notes, would not have rendered him *particeps criminis* in the attempt to compound the felony; (2) that even if the original transactions were illegal as to all the parties, yet after it has been fully performed, and A. has received the avails of it, he might be compelled by B. to account, on the ground of its illegal character; (3) that it is immaterial that X. paid his notes after the duress had ceased, such payment not having been induced by any act of B. after the duress had ceased; (4) that if B., after his release from duress, might by suit have restrained payment of the money by X. to A., and rescinded the whole contract, yet his failure to do so is no defense to his action against A. for the amount. *Kiewert v. Rindskopf*, 48 Wis. 481; *Armstrong v. Toler*, 11 Wheat. 258; *McBlair v. Gibbs*, 17 How. 236; *Brooks v. Martin*, 2 Wall. 70; *Planters' Bank v. Union Bank*, 16 id. 483; *Baehr v. Wolf*, 59 Ill. 470; *Douville v. Merrick*, 25 Wis. 688.

In *Whittemore v. Farley*, English Court of Appeal, May, 1881, A. having been arrested at the instance of B. on the charge of having committed the offense of larceny by a bailee, was brought up before a magistrate and remanded. A.'s wife then induced B. to withdraw from the prosecution on A.'s wife agreeing to charge her separate real estate with the amount taken. The title deeds of the property were deposited at a bank in the joint names of the solicitors of the parties. A. being again brought before the magistrate, the latter, having been informed of the terms, allowed the prosecution to be withdrawn. A.'s wife afterward refused to perform her agreement. B. brought an action to enforce the charge, and A.'s wife counter-claimed for a declaration that she was entitled to have the deeds delivered up to her. *Held* (affirming the decision of Fry, J., 43 L. T. Rep. [N. S.] 192), that the agreement to charge the separate property was illegal and could not be enforced, and that the defendant was entitled to the declaration for delivery of the deeds. Larceny by a bailee is a felony, but if it had been a misdemeanor, the agreement to charge in consideration of the withdrawal of the prosecution would have been void. *Williams v. Bayley*, 14 L. T. (N. S.) 802; *Kelr v. Leeman*, 3 L. T. 299, and 7 id. 347; *Davis v. Holding*, 1 M. & W. 159. See, also, *McMahon v. Smith*, 47 Conn. 221; s. c., 36 Am. Rep. 67. and note, 70.

In *Barron v. Tucker*, 53 Vt., it was held as follows: The consideration of a contract must not only be valuable but lawful; hence there can be no recovery by one for his time and services, the purpose and tendency of whose employment was to obstruct the administration of justice, by influencing State witnesses, and by inducing the State's attorney to hold back in the discharge of his official duty in prosecuting the defendant charged with adultery. Chancellor Kent lays down the rule that the consideration of a contract must, in order to entitle the party to recover, "not only be valuable, but it must be a lawful consideration, and not repugnant to law or sound policy or good morals. *Ex turpi contractu actio non oritur*; and no person even so far back as the feudal ages, was permitted by law to stipulate for iniquity." 2 Kent. Com. *466. In Smith on Cont. 111, the author says:

"There is another remarkable instance of contracts falling under this class, namely, of illegality created by the rules of common law. It consists of contracts void because of having a tendency to obstruct the administration of justice." And he cites *Collins v. Blantern*, 2 Wils. 341; *Unwin v. Loper*, 1 M. & Gr. 747; *Kier v. Leeman*, 6 Ad. & E. 316. There are numerous cases in the English and American reports, including those of Vermont, which illustrate the general rule that contracts are illegal when founded on a consideration *contra bonos mores*, or against the principles of sound policy; as where the consideration was the suppression of evidence in a criminal prosecution, *Badger v. Williams*, 1 D. Chip. 187; stifling a criminal prosecution, *Bailey v. Buck*, 11 Vt. 252; compounding of felonies or suppressing a criminal prosecution. *Hinesburgh v. Sumner*, 9 Vt. 23; *Bowen v. Buck*, 28 id. 308; sale of office, *Ferris v. Adams*, 23 id. 136; hired electioneering, *Nichols v. Mudgett*, 32 id. 546; "lobbying in the Legislature," *Powers v. Skinner*, 34 id. 274. The law gives no countenance to an illegal contract. See *Appeal of Bredin*, post.

In *Haines v. Rudd*, 83 N. Y. 251, it was held, that where one without force or threats has given his note to compound a felony, and has been compelled to pay it to a *bona fide* transferee, he cannot recover the amount so paid from the person to whom he gave it.

McCleary v. Ellis.

MCCLARY V. ELLIS.

(54 Iowa, 311.)

Deed — condition against alienation.

In a deed granting a life estate to one, with remainder in fee to his children, a condition against alienation by the grantee or sale for his debts is void.

SUIT to enjoin a sheriff's sale of real estate on execution. The deed referred to in the opinion was as follows:

*“Know all men by these presents, That I, Abraham McCleary, of the county of Louisa, of the State of Iowa, do give my son John McCleary all my interest in the following lands. * * * To have the above described lands his life-time, and to go to his children at his death, but if he dies without children, then the above described land to go to his brother George McCleary, and at his death is to go to his brother's children — that is, George McCleary's children, but if George dies without children, it is to go to his sister's children. It is expressly understood that he shall not part with it nor sell it, nor shall any person sell it for him or for debts whatsoever.”* The plaintiff appeals. The defendant had judgment below.

Hoffman, Pickler & Brown, for appellant.

Tatlock & Wilson, for appellee.

DAY, J. I. From an examination of the deed of Abram McCleary it is evident that it conveys a fee simple estate. The conveyance is of a life estate to George McCleary, remainder to his children, but if he should die without children, to his brother George and his children; and if George should die without children, remainder to his sister's children. The conveyance is of a life estate and a vested remainder in fee. 4 Kent Com. 203. No reversionary interest is retained in the grantor. He has disposed of his entire estate in fee. The disposition of the estate is to the beneficiary direct, without the intervention of trustees. The question in this case is, can the grantor of the fee impose restraints upon alienation?

Littleton, in section 360, states the doctrine upon this subject as

follows : " If a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is infeoffed of lands or tenements he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void." Commenting upon this, Lord Coke says : " And the like law is of a devise in fee upon condition that the devisee shall not alien, the condition is void, and so it is of a grant, release, confirmation, or any other conveyance, whereby a fee simple doth pass. For it is absurd and repugnant to reason that he that hath no possibility to have the land revert to him should restrain his feoffee in fee simple of all his power to alien. And so it is if a man be possessed of a lease for years, or of a horse, or any other chattel, real or personal, and give or sell his whole interest and property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him, so as he hath no possibility of a reverter, and it is against trade and traffic, and bargaining and contracting between man and man : and it is within the reason of our author that it should oust him of all power given to him." Coke on Litt. 223 a.

The case of *Mandlebaum v. McDonell*, 29 Mich. 78 ; s. c., 18 Am. Rep. 61, contains a very elaborate and exhaustive consideration of this question. In that case a devise for life was made to the widow of the testator, remainder in fee to his sons and grandson, with a restriction upon alienation during the life of the widow, if she remained unmarried, and until the grandson, who was then four years old, should attain the age of twenty-five. The restriction upon the right of alienation was held void. In announcing the opinion of the court. CHRISTIANCY, J., employs this language : " If there is any English decision since the statute *quia emptores*, where the point was involved, in which it was held competent for a feoffor, grantor or devisor, of a vested estate in fee simple, whether in remainder or possession, by any condition or restriction in the instrument creating it, to suspend all power of the feoffee, grantees or devisee, otherwise competent, to sell for a single day, I have not been able to find it : and the able counsel for the defendants, whose research nothing of this kind is likely to escape, seem to have been equally unsuccessful." And further : " We are entirely satisfied

McCleary v. Ellis.

there has never been a time since the statute *quia emptores* when a restriction in a conveyance of a vested estate in fee simple, in possession or remainder, against selling for a particular period of time, was valid by the common law, and we think it would be unwise and injurious to admit into the law the principle contended for by the defendants' counsel, that such restrictions should be held valid, if imposed only for a reasonable time.

"It is safe to say that every estate, depending upon such a question, would by the very fact of such a question existing, lose a large share of its market value. Who can say whether the time is reasonable, until the question has been settled in the court of last resort? And upon what standard of certainty can the court decide it? Or, depending as it must upon all the peculiar facts and circumstances of each particular case, is the question to be submitted to a jury? The only safe rule of decision is to hold, as I understand the common law for ages to have been, that a condition or restriction, which would suspend all power of alienation for a single day, is inconsistent with the estate granted, unreasonable and void."

For another case containing a most exhaustive consideration of this question, see *De Peyster v. Michael*, 6 N. Y. 467. In this case, after a very full review of the authorities, upon page 497, it is said: "Upon the highest legal authority therefore it may be affirmed that in a fee simple grant of land, a condition that the grantee shall not alien, or that he shall pay a sum of money to the grantor upon alienation, is void, upon the ground that it is repugnant to the estate granted."

In *Bradley v. Peixoto*, 3 Ves. Jr., 324, it is said: "I have looked into the cases that have been mentioned, and find it laid down as a rule long ago established, that where there is a gift with a condition inconsistent with and repugnant to such gift, the condition is wholly void. A condition that a tenant in fee shall not alien is repugnant." See, also, *Brandon v. Robinson*, 18 Ves. Jr. 429; *McCullough v. Gillmore*, 11 Penn. St. 370.

In *Walker v. Vincent*, 19 Penn. St. 369, a testator devised to his daughter and to her legal heirs forever certain real estate, with the express condition that she should not alien or dispose of the same or join with her husband in any deed for the conveyance thereof during her natural life." The court held the condition void, and that a fee simple estate was devised, and say: "It makes no difference that the testator has expressly withheld one of the rights

essential to a fee simple, for the law does not allow an estate to be granted to a man and his heirs with a restraint on alienation, and frustrates the most clear intention to impose such a restraint, just as it allows alienation of an estate entail, though a contrary intent is manifest. And it would be exceedingly improper in any court, in construing a devise to a man and his heirs, to endeavor to give effect to the restraint upon alienation by changing the character of the estate to a life estate, with a remainder annexed to it, or with an executory devise over." In *Hall v. Tufts*, 18 Pick. 455, a testator devised certain real estate "to his wife for her life, and the remainder of the estate, whether real or personal, in possession or reversion, to his five children, to be equally divided among them or their heirs respectively, always intending and meaning that none of his children shall dispose of their part of the real estate in reversion before it is legally assigned to them." It was held that the children took a vested remainder in the real estate given to the wife for her life, and that the clause restraining them from alienating the same before the expiration of the life estate was void. The case of *Blackstone Bank v. Davis*, 21 Pick. 42, is exactly in point. In that case one Davis devised to his son the use of a farm of one hundred and twenty acres, with a provision that the land should not be subject or liable to conveyance or attachment. The plaintiffs recovered a judgment against the devisee, and levied an execution upon the premises as upon land held by the defendant in fee. The court say: "By the devise of the profits, use or occupation of the land, the land itself is devised. Whether the defendant took an estate in fee or for life only is a question not material in the present case. The sole question is whether the estate in his hands was liable to attachment, and to be taken in execution as his property. The plaintiffs claim title under the levy of an execution against the defendant, and their title is valid if the estate was liable to be so taken. That it was so liable, notwithstanding the proviso or condition in the will, the court cannot entertain a doubt."

The appellant cites and relies solely upon *Nichols v. Eaton*, 91 U. S. 716. In that case the testator devised her real estate to trustees upon trusts to pay the rents, profits and interest to her four children, with a proviso that if any of her sons should alienate or dispose of the income, or if by means of bankruptcy or insolvency, or any other means, said income could not be personally enjoyed by them respectively, but should become vested in or payable

City of Chariton v. Barber.

to some other person, then the trust expressed in said will, concerning so much thereof as would so vest, should immediately cease and determine. The case differs from the present one in two essential and controlling particulars:

1. The estate was devised to trustees and never vested in the beneficiaries.

2. The enjoyment of the benefits of the devise was made to depend upon a condition.

We have no hesitancy in holding, in view of the authorities above quoted, and others that might be referred to, that the conditions in this deed against alienage and liability for debts are void.

[Minor point omitted.]

Affirmed.

CITY OF CHARITON V. BARBER.

(54 Iowa, 380.)

Municipal corporation — ordinance — disorderly houses.

Under powers to "suppress and restrain" disorderly houses and to enact ordinances to "improve the morals and order" of the community, a city cannot enact an ordinance declaring the keeping of a disorderly house a misdemeanor, punishable by fine and imprisonment.*

CONVICTION of keeping a disorderly house, reversed by District Court. The opinion states the case.

Dell Stewart, city solicitor, for appellant.

Mitchell & Penick, for appellee.

BECK, J. I. An ordinance of the city of Chariton provides that if any one shall, within the city, "keep any bawdy house or house of ill-fame, or house of assignation, or shall lease or let any house for such purpose, or permit any house under his control to be so used" * * * he "shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined in a sum not less than one, nor more than fifty dollars, and costs of prosecution, and stand committed." etc.

*See *Town of Bloomfield v. Trimble*, post.

City of Chariton v. Barber.

The information charges that defendant did, in violation of this ordinance, in the city of Chariton, keep a house of ill-fame.

The demurrer brought in question the authority of the city council to pass the ordinance. The District Court held that such authority is not conferred by the statutes of the State.

We will proceed to consider the questions presented by counsel in argument upon this appeal.

II. Code, § 456, confers upon cities power "to suppress and restrain disorderly houses, houses of ill-fame, billiard tables, nine or ten pin alleys, and to authorize the destruction of all instruments or devices used for the purpose of gaming."

Code, § 482, is in these words: "Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the State, for carrying into effect or discharging the powers and duties conferred by this chapter, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of such corporation and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days."

The authority of the city to pass the ordinance in question, plaintiff claims, is found in these provisions, and no others are relied upon to support it.

The authority conferred by section 456 is "to suppress and restrain" houses of ill-fame. It is insisted that the punishment of the offense of keeping such houses will tend to suppress and restrain them, and the power to punish the offense is therefore incidentally conferred. But this court has held that the authority conferred upon a city to suppress gambling did not authorize the punishment of keeping devices for gambling. *City of Mt. Pleasant v. Breen*, 11 Iowa, 399.

It was held that the authority was to suppress, not punish, gambling, and it must be exercised in such a way that the suppression will be the direct, not incidental, result of the application of the provisions of the ordinance. The decision is not without grave objections as to the reasons upon which it is based. But it has been accepted without question or challenge for more than nineteen years. We ought not, at this late day, to disturb it.

It may well be remarked that the power conferred may be exer-

City of Chariton v. Barber.

cised by ordinance which shall provide for the direct suppression of houses of ill-fame. In attaining that end the ordinance may provide for closing the houses, removing the inmates, and other like proceedings. The keepers of such houses may be made liable for the costs in such proceedings, and for fines for refusing assistance to the officers, and obedience to their lawful requirements.

III. It is insisted by plaintiff's counsel that authority for the ordinance is found in the provision of Code, § 482, above quoted, empowering cities to make ordinances "to improve the morals and order" of their inhabitants. There is no express authority found in the section for the cities to punish crimes in order to improve the morals of the people.

The keeping of houses of ill-fame is surely subversive of good morals, and is a crime punishable under the laws of the State. Code, § 4013. All other crimes are subversive of good morals. The construction of the section under consideration contended for by counsel would authorize the cities to provide, by ordinances, for the punishment of all crimes. But this cannot be admitted.

The statute may be made effective by holding that it authorizes ordinances which will tend to improve the morals of the inhabitants, so far as their morals may be affected by houses of ill-fame, by forbidding lewd women to reside therein, by forbidding persons to visit such houses except on lawful business, and other like prohibitions. It therefore cannot be claimed that the interpretation of the statute insisted upon by plaintiff's counsel is necessary in order to give it operation.

IV. Counsel for defendant insist that the legislature has not the constitutional power to confer authority upon cities to punish the commission of acts which are declared by the laws of the State to be crimes, and punishable as such. This constitutional question does not properly arise under the view we take, that the statutes in question do not confer such authority upon cities. It will not therefore be considered.

State v. Wells, 46 Iowa, 662, has no application to the case before us. We determined, in that case, that an ordinance of a city similar to the one under which defendant was prosecuted is not in conflict with the Constitution of the United States. The questions we have discussed in this opinion were not in that case, and the point decided therein is not now before us.

The judgment of the District Court is affirmed.

Judgment affirmed.

TOWN OF BLOOMFIELD v. TRIMBLE.

(54 Iowa, 899.)

Municipal corporation — ordinance — drunkenness.

Under a power to "prevent riots, noise, disturbance," etc., and "preserve peace and order," a town may enact an ordinance for the arrest and punishment of persons found intoxicated.*

CONVICTION of public intoxication. The head note and opinion state the case.

Traverse, Payne & Eichelberger, for appellants.

No appearance for appellee.

ROTHROCK, J. I. It is said in argument that the District Court sustained the demurrer upon the ground that the statute does not grant the power to municipal corporations to punish intoxication by ordinance.

It is true the statute does not specifically provide that a municipal corporation may punish persons for intoxication or drunkenness. But there are many subjects of municipal control which are not expressed and particularly named in the sections of the Code conferring powers upon cities and towns. Section 456, after enumerating certain powers of the incorporation, such as the prevention of riots, noise, disturbance, disorderly assemblages, etc., provides that they shall have power "to preserve peace and order therein." By section 482 municipal corporations are empowered to make and publish ordinances not inconsistent with the laws of the State. "and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience, of such corporation and the inhabitants thereof."

We entertain no doubt, that under these provisions, a town or city may, by ordinance, punish for drunkenness. The town council has, by ordinance, determined that where a person voluntarily deprives himself of his reason by intoxication, he has done an act which is derogatory to the "peace and order" of the incorporation,

* See *City of Charlton v. Barber*, ante.

Nulton v. Clayton.

and "the comfort and convenience of the inhabitants." To hold that the council, when it enacted this ordinance, exceeded its powers, and was mistaken as to the effect of drunkenness in the incorporation, and that it does not affect the public peace and order, and the comfort and convenience of the inhabitants, would, it seems to us, be contrary to the common experience of mankind.

II. The ordinance in question is in substance the same as § 1548 of the Code, which provides for the punishment of persons found in a state of intoxication. Both the State law and the ordinance provide for the punishment of the same offense. That an ordinance of this character is not void, see Cooley's Const. Lim. 198, where it is said: "Indeed, the same act may constitute an offense against both the State and the municipal corporation, and may be punished under both without violation of any constitutional principle."

The learned author states that such is the clear weight of authority. See, also, 1 Bish. Cr. Law, § 145, 835-7, 897.

In our opinion the demurrer to the information should have been overruled.

Judgment reversed.

NULTON V. CLAYTON.

(54 Iowa, 425.)

Corporation — subscription to stock.

A writing, reciting an association for the purpose of organizing a bank, and stating among other things "the names and residences of the shareholders, with the number of shares held by each," and subscribed by the incorporators, constitutes a subscription to the capital stock, on the part of the signers, and binds them to pay for the number of shares set opposite their respective names. (*See note, p. 215.*)

ACTION on a subscription to stock. The head note and opinion state the case. The defendant had judgment below.

Trimble, Carruthers & Trimble, for appellant.

Traverse, Payne & Eichelberger, for appellee.

ADAMS, C. J. The action is brought to recover one-half of the amount of the alleged subscription, the other half having al-

ready been paid. The defendant insists that it is not shown that he contracted to pay any sum whatever. The defendant did not become a stockholder by subscribing the articles of incorporation. If he became such he did so by subscribing what we have denominated the statement. The more important portion of it is the third division. That is a declaration purporting to be made by the associated persons showing each his respective interest in the corporation. Is it a subscription to stock? If so, the defendant is liable to pay for the number of shares set opposite his name, without a promise to do so in so many words. This has been held repeatedly.

In *Spear v. Crawford*, 14 Wend. 20, 28 Am. Dec. 513, the writing subscribed was in these words:

"We the subscribers do hereby severally agree to take the shares by us subscribed in the Harlem Canal Company." A certain number of shares was set opposite the name of each subscriber. The question presented was whether the mere agreement to take shares rendered the defendant liable to pay for them. The court held that it did.

In *Hartford & New Haven R. R. Co. v. Kennedy*, 12 Conn. 500, the word "subscriber" was used in what was claimed to be the subscription to stock. It was held that the subscriber was liable to pay for the stock, without a promise to do so in so many words. The court said: "It is true a promise to pay in precise terms does not appear to have been made. The defendant has not affixed his signature to an instrument which contains the words: 'I promise to pay,' but he has done an equivalent act. He has contracted with the plaintiff to become a member of the corporation, and to be interested in its stock."

In *Rensselaer & W. Plank Road Co. v. Barton*, 16 N. Y. 460, the court said: "Whatever may be the form or language of a subscription to the stock of an incorporated company, any person who in any manner becomes a subscriber for, or engages to take any portion of, the stock of such company, thereby assumes to pay according to the conditions of the charter." See, also, *Small v. Herkimer Manufacturing and Hydraulic Co.*, 2 Comst. 335; *Dayton v. Borst*, 31 N. Y. 437; *Hartford & New Haven R. R. Co. v. Croswell*, 5 Hill, 384; *Waukon & Mississippi R. R. Co. v. Dwyer*, 49 Iowa, 121.

Probably the defendant would not deny that where there is a

Nulton v. Clayton.

valid subscription to stock, or written agreement to take stock, there arises upon such subscription or agreement an obligation to pay for it. But the defendant insists that the writing in this case, whatever it may be called, falls short of being a subscription to stock, or agreement to take stock.

It declares that "the number of shares held by each are as follows:" Then follow names and amounts. The averment of the petition in substance is that the defendant by this contract subscribed for ten shares. By this we understand that the writing was signed by the defendant. The association purports to be incorporated under the general incorporation law. What purpose such a written declaration by the associated persons could have, if they were not thereby to become subscribers, each for the amount set opposite his name, we are unable to conceive. It is suggested that the written declaration was perhaps designed as a written admission of a previous subscription; but we see no reason for a formal written admission of what must have been already in writing, if there was a subscription to be admitted. It appears to us far more probable that the declaration was designed as a subscription. Now it matters not how informal the writing may be, if the intent of the parties can be collected from it. What the intent was in this case we have no reasonable doubt. The parties intended to adopt articles of incorporation, and become subscribers to the stock thereunder. If they did they became obligated to pay in accordance with the eighth article to which they made themselves parties.

Suppose a creditor of the association had brought an action upon his claim against the defendant, alleging that he is a partner. We think that the defendant might, and would, have set up the incorporation and sought shelter beneath it. There is no doubt that he in good faith attempted to become a member, and limit his liability by the exemption provided. If he could have escaped liability as a partner by setting up the incorporation and his membership, he cannot escape the limited liability incident to such membership.

We think that the demurrer was improperly sustained.

Reversed.

NOTE BY THE REPORTER. — In *Hawley v. Upton*, 102 U. S. 314, defendant, in 1871, was requested by R. the agent of an insurance company, to subscribe for its stock. In consequence of the inducements offered, he subscribed the paper and delivered it to the agent. *The Great Western Insurance Company. [\$200.] Capital stock \$500,000. with liberty to increase to \$5,000,000. Stock non-assessable. Organized July 20, 1857, under act of legis-

Stanley v. City of Davenport.

lature approved March 4, 1857. Know all men by these presents, that for and in consideration of ten shares of the capital stock of the Great Western Insurance Company of Chicago, Ill., received by me, I am held and firmly bound, and agree to pay the Great Western Insurance Company of Chicago the sum of two hundred dollars in installments, as follows: twenty-five per cent thereof upon receipt of stock certificate, twenty-five per cent in three months from date hereof, twenty-five per cent six months from date hereof, twenty-five per cent nine months from date, with interest 10 per cent after due." At the time he paid the agent \$25. No certificate of stock was ever given to him and he demanded none, and paid no assessments. The company became bankrupt. In an action by the assignee in bankruptcy against defendant as a stockholder, held that he was such and liable for the amount of stock set forth in the paper signed by him. *Upton v. Tribilcock*, 91 U. S. 45; *Webster v. Upton*, id. 65. Judgment of U. S. Circ. Ct. Iowa, affirmed. Opinion by WAITE, C. J.

STANLEY V. CITY OF DAVENPORT.

(54 Iowa, 463.)

Municipal corporation — steam motor in city street.

A city has no inherent right to authorize or permit the use of steam-motors upon railways in its streets, where the fee of the streets is in the city in trust for public uses, and is responsible for personal injury caused through the fright of a horse thereby. (*See note, p. 224.*)

ACTION of damages for personal injury caused by the fright of the plaintiff's horse by a steam motor upon a street of the defendant. The defendant had judgment below.

A. J. Hirschl, for appellant.

H. M. Martin, for appellee.

SEEVERS, J. [Omitting a question of practice.] In 1870 the defendant granted to Davenport Central Railroad Company "the exclusive right to lay and operate upon * * * Brady * * * street in said city a single horse railway with the necessary side tracks." The right of the city to make this grant is not questioned.

In 1878 the city granted "I. M. Davies permission to run one of Baldwin's Noiseless Steam Motors on Brady street hill on probation for thirty days." The motor was run and operated on the track of the street railway company.

It has been held that cities have the authority to grant railway companies who use steam in operating their roads the right to occupy with their tracks a street or streets of the city. *Milburn v.*

Stanley v. City of Davenport.

Cedar Rapids, 12 Iowa, 246. and numerous other cases. These decisions were based on a statute providing that "any railway corporation may raise or lower any turnpike, plankroad or other highway for the purpose of having its railway pass over or under the same, and in such cases said corporation shall put such highway as soon as may be in as good repair and condition as before such alteration." Code, § 1262. In the *Milburn* case the words "pass over" were construed to mean "upon" or "lengthwise," and this construction has been several times followed in subsequent cases. As thus construed the legislative assent had been given to the laying down of railway tracks in streets and the operation of the same by the use of steam, subject however, to proper equitable control and police regulations. *Chicago & S. W. R. R. Co. v. Mayor, etc.*, 36 Iowa, 299. But it never has been held that cities had the authority to grant such privileges in the absence of a legislative grant to that effect. Whatever may have been said by judges who have written opinions in the cases in which this question has been determined or discussed, it is quite apparent, we think, that all the cases subsequent thereto are based on the *Milburn* case, which, as we understand, is based on the statute. It is worthy of note that notwithstanding the several decisions following the *Milburn* case, it has not been deemed satisfactory to the profession or general public. This is apparent from the numerous cases in which the doctrine of that case has been vigorously assailed by counsel.

Finally, in 1874, the General Assembly enacted a substitute for Code, § 1262, which provides that railway corporations may "cross over or under" any highway with its railway. Chapter 47, Laws of Fifteenth General Assembly. To cross over or under does not mean upon or lengthwise. Under the circumstances the legislative intent has been clearly expressed, and it is to the effect that railways operated by steam cannot be constructed upon streets and highways except as provided in a section of the Code hereinafter referred to. Or if this be not true, the legislative assent contained in section 1262 of the Code has been withdrawn by the enactment of the statute of 1874. We are not called on to vindicate or condemn the wisdom of this statute; to construe or ascertain its meaning is our only province. The various decisions above referred to are not now correct expositions of the law, because they have been superseded by that branch of the government whose province it is to enact, but not to construe the law.

III. The remaining question is whether the city had the authority, in the absence of a grant from the General Assembly to authorize or permit the use of the steam motor on Brady street in said city. If such power did not exist, the permission given could well be styled negligence, for which the city should be held responsible. Unless the city can shield itself by reason of its authority in the premises, the permission to use the motor on the street constituted negligence. That it was an experiment is not material. If the power existed, it matters not whether the authorized use was for a long or short period of time.

The defendant was organized under a special charter, and it is stipulated by counsel that neither the charter nor ordinances of the city expressly prohibit the street railway company "from using other than animal power in operating its road," nor does the charter or ordinances contain a grant to that effect; therefore we think it must be true the street railway company had no right to use or authorize the use of steam on its track; hence the application to the city council, and the necessity that it should grant the requisite permission.

The charter empowers the defendant to "open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve and keep in repair streets, avenues and alleys." That the requisite power is not contained in the charter we regard as beyond serious controversy. We feel the more certain of this because the learned counsel for the city does not claim such authority is contained therein. It may be that cities organized under the general incorporation law have such authority; if so, it is because there is a statute to that effect. Code, § 464. Such statute however is not applicable to the defendant.

The fee of the streets is in the city, and yet it is held in trust for the use and benefit of the public. The city does not have the authority to sell and convey the title held by it or authorize the streets to be used for private purposes. Nor can it without legislative authority grant the use of a street for a public purpose, which renders it dangerous for the public to travel over it in any other manner. The power partakes of that of eminent domain, which, under our government, can only be granted by the law-making power of the State.

Streets and highways are under the exclusive control of the General Assembly. It matters not if the fee of the streets is in the

Stanley v. City of Davenport.

city, it has no authority to control or grant rights and privileges thereto or thereon, unless it has been so authorized. The power and authority of the city is contained in its charter and bounded thereby. It has no other or different control of the streets than is prescribed in the charter or the general statutes of the State. A distinction has been drawn between a railway operated by horse and steam power, and whether the defendant may authorize the former and not the latter is not in this case, and we only allude thereto lest we may be misunderstood.

The strong current of the authorities, as we understand, is in accord with the views herein expressed. 2 Dillon Mun. Corp. 567, 568; *Davis v. Mayor, etc.*, 14 N. Y. 506; *Milhau v. Sharp*, 27 id. 611; *Commonwealth v. E. & N. E. R. R. Co.*, 27 Penn. St. 344; *Protzman v. I. C. R. R. Co.*, 9 Ind. 468; *State v. Inhabitants of Trenton*, 36 N. J. L. 83; *Memphis City R. R. Co. v. Memphis*, 4 Cold. 406.

IV. It is suggested, but not pressed in argument, that the act of the city council being without authority, the city is not responsible for any consequences resulting therefrom. The city had jurisdiction of the subject matter, that is, of the streets, and could only act in relation thereto through its council. The latter had control of the streets of the city, but were mistaken as to the extent of their authority. The particular thing the council authorized to be done was illegal, and we think the city is responsible for the consequences resulting therefrom.

The modern doctrine we understand to be this, "Whenever an action for an injury to the property or person of another will lie against an individual, corporations will in like circumstances be equally liable for injuries committed by their officers and agents, acting within the apparent scope of their authority." It was therefore held in *Lee v. Village of Sandy Hill*, 40 N. Y. 442, that the defendant was liable for a trespass committed under the direction of the village trustees. The trespass consisted in removing a fence which they erroneously supposed encroached upon the street. In *City of Pekin v. Newell*, 26 Ill. 320, the city was authorized "to build and construct an embankment and plankroad across the Illinois river bottom opposite said city." Instead of so doing, a pile bridge was constructed in such a negligent manner that the horse of the defendant in error fell through the bridge and was killed. The city sought to defend on the ground that the

Stanley v. City of Davenport.

bridge was built without authority, but it was, rightly we think, held otherwise. Other authorities might be cited to the same effect.

Judgment reversed.

ON REHEARING.

SEEVERS, J. A rehearing was granted on the application of the defendant, and it is deemed best to restate the material question determined in the foregoing opinion, and state more fully the reasons inducing us to adhere thereto.

The pivotal question is, although the fee-title to the streets is in the city, yet it is held in trust for the public, subject to the control of the general assembly. Assuming for the present this proposition to be correct, it necessarily follows the sovereign power may, or may not, grant to cities the power to grade or otherwise control the same. Therefore, the claimed power, whatever it may be, should affirmatively appear to have been expressly granted in the charter, general statutes, or can be necessarily implied therefrom. So far from this being so, we think the contrary has been clearly indicated. Section 464 of the Code provides that cities may authorize or forbid the construction of railways in streets, but such authority cannot be granted by the city except on condition the abutting property owner shall be compensated. When this statute was enacted (Code, § 1262), or the Right of Way Act was in force, which authorized railroad companies to construct their roads lengthwise along streets. Section 464 of the Code affected all the cities in the State except six or eight organized under special charters.

Afterward there was enacted chapter 47, of the acts of the fifteenth general assembly, repealing § 1262 of the Code, and enacting a substitute therefor. See McClain's Code, § 1262. This last statute authorizes railways to cross over or under any highway. There are no other statutes bearing on the subject under consideration, therefore it can be safely affirmed there is none giving the consent of the sovereign power to the construction of a railroad lengthwise along any highway.

It is insisted the *Milburn* case was not based on Code, § 1262, and that the foregoing opinion overrules that case. To this it may be said, in the first place, that such statute was in existence when that and all other cases were decided in which the question under consideration was before the court, and therefore no such question as the one now before us could have arisen in those cases. But it seems

Stanley v. City of Davenport.

to us there can be no doubt as to what was decided in the *Milburn* case, or the ground upon which it was placed. It is there said: "Now the law-making power of this State has thought proper, as we construe the statute, to give to railway companies the right to construct their railways upon streets of cities, and they have invested the local governments of those cities both with the fee of the soil of the streets, and the exclusive control over the same, and if, in the exercise of their proprietary rights and police regulations over streets, they should determine that iron rails and their use are a legitimate street improvement, upon what ground can the court determine otherwise, or control their authority in this respect. We apprehend none, for the reason that both the *company and the city have derived the rights and privileges in the premises from the sovereign power of the State*, which cannot be supposed to authorize that which would amount to a nuisance." In order to emphasize what we understand to be the ground upon which the decision is based, we have italicized a portion of the quotation. The decision rests on the grant of the sovereign power of the city. This last, in the subsequent case of *City of Clinton v. Cedar Rapids & M. R. R. Co.*, 24 Iowa, 455, was held to be unnecessary, and that the company could rest securely on the legislative grant. This being essential, that of the city is immaterial. The only statute relied on by the court in either of those cases was the Right of Way Act. It is true there was some difference of opinion as to the governing statute, but this is immaterial in the present case.

It is said that "cities, by virtue of the original dedication of the streets to the corporation, obtained authority to devote them to railway purposes," and that this doctrine was announced in *Cook v. City of Burlington*, 36 Iowa, 357. The same point was made by council in *Hughes v. M. & M. R. Co.*, 12 Iowa, 261, but the case was determined on the ground stated in the *Milburn* case. The only point decided in the *Cook* case was that the city might voluntarily do what the railroad company could accomplish by calling into exercise the power of eminent domain.

It is not claimed the dedicator in the act of dedication provided that said roads might occupy the streets, but as the act of dedication is silent as to the uses that may be made of the streets, the authority "given to cities by the statute regulating their dedication to the public" cannot be abridged. This implies there is an affirmative statute other than the charter giving cities control of

the streets. We fail to find any such. There have been several enacted from time to time regulating the dedication of streets and public grounds. They are all in substance the same, and provide that "the acknowledgment and recording of such plant is equivalent to a deed in fee simple of such portion of the lands as is therein set apart for public" use. Code of 1851, § 637.

The title is vested in the city for the use of the public. The city holds the title in trust for the public. The latter is, and can only be, represented or bound by the sovereign or law-making power. The city is much less than this, being the creature of such power, and possessing only the powers expressly granted or necessarily implied. 1 Dill. on Mun. Corp., § 55.

It is admitted on all hands that the highways of the State are subject to the law-making power, and their use is controlled and governed thereby. Mills on Eminent Domain, § 203.

It is conceded that the city, having first obtained the legislative assent, has authority to grant railway companies the right to use, and occupy with their track, a street of such city, and there is nothing in any of the opinions cited in *Kucheman v. C. C. & D. R. Co.*, 46 Iowa, 366, which can be properly construed as going beyond this.

This whole doctrine is summed up in 2 Dill. on Mun. Corp., §§ 575, 576 and 577, after an examination of the reported cases by the learned author, and it is there said: "Where the fee of the street is in the municipality in trust for the public, or in the public, the control of the legislature is supreme, and it may authorize or delegate to municipal bodies the power to authorize either class of railways to occupy streets without providing for compensation either to the municipality or the adjoining owners."

Our examination of the authorities leads us to the conclusion that the stated proposition is undoubtedly correct.

Counsel cite *Moses v. Pittsburgh & Fort Wayne R. R.*, 21 Ill. 516; *I. B. & W. R. R. Co. v. Hartley*, 67 id. 439; s. c., 16 Am. Rep. 624; *Lexington & Ohio R. R. Co. v. Applegate*, 8 Dana, 289; *Alchison & Nebraska R. R. Co. v. Garside*, 10 Kan. 552; and other cases. Lengthy quotations are made from some of the opinions for the purpose of establishing the proposition that cities have the power to authorize railroads to occupy a street independent of a Right of Way Act or other legislative authority. In all of the cited cases the requisite authority had been granted either in the char-

Stanley v. City of Davenport.

ters of the city, company, or general statutes, and the contest was whether this could be done without compensating the abutting owner, and no more or less was decided therein than in the *Milburn* case.

No adjudicated case to which our attention has been called, and we believe it may safely be affirmed none exists, in which it has been held a city may authorize a railroad operated by the use of steam to occupy the streets of a city, unless authority to this effect has been granted by the sovereign power.

It is said: "All courts everywhere have for the last fifteen years without dissenting opinion, conceded the authority of cities to grant the use of streets for horse railways." Because of this, it is further said when it is admitted cities have authority to decide that one kind of advanced mode of travel may be allowed, their jurisdiction is conceded, and cannot be controlled by the courts. We shall not stop to discuss either proposition. It will be conceded, if no change is made in the grade of the street, the weight of authority seems to be the city may authorize a horse railway to occupy the same. This doctrine is based on the ground "there is no annoyance from fire, smoke, steam-whistles, or rapid progress, and it does not signify that the street railroad has an exclusive right to use its own track when occasion requires." Mills on Eminent Domain, § 205. It was so held in *Hinchman v. Patterson Horse R. R. Co.*, 17 N. J. Eq. 75; and in that State the fee of the streets is in the abutting owner. It had been previously held in *Starr v. Camden & Atlantic R. R. Co.*, 24 N. J. L. 592, that a highway could not be occupied by a railroad operated by steam, with legislative consent, without compensating the abutting owner. Both these cases are referred to with approval in *Jersey City & Bergen R. R. Co. v. Jersey City & Hoboken Horse R. R.*, 20 N. J. Eq. 61, upon the ground it is presumed stated in *Inhabitants of Springfield v. Connecticut River R. R.*, 4 Cush. 63, that where a road is operated by steam, and used by the general public also, the two uses are "almost if not wholly inconsistent with each other, so that taking the highway for a railroad will nearly supersede the former use to which it had been legally appropriated." This doctrine has not to our knowledge been anywhere impugned. It does not therefore follow the conceded proposition that a city may lawfully allow the streets to be occupied by a horse railroad, that it may do so where the road is operated by steam power.

Stanley v. City of Davenport.

The question before the court was whether the defendant had authority to permit the steam motor to be used on the street named in the petition. This question was determined in the negative. This being so, the further question arose whether the defendant was liable, conceding the allegations of the petition to be true. This was determined in the affirmative. And beyond these two questions we had no occasion to go, and nothing short of this would have met the exigencies of the case.

The former opinion is adhered to.

ADAMS, O. J., dissenting.

NOTE BY THE REPORTER. — ADAMS, J., dissenting in this case said: "Decisions in regard to the occupancy of streets by ordinary railroads, not designed for street purposes, are in my judgment not strictly applicable to this case. A street railroad, whether operated by animal, steam, or other power, is not an obstruction to the same extent. It is consistent with all the legitimate uses to which a street is put, and has come to be deemed a public necessity. In my opinion a city council may regulate the use of streets, without any special grant of power in this respect, and may in its discretion, with a view to promoting the public interest, allow cars to be drawn thereon for street purposes, either by animal, steam, atmospheric pressure, or other power, and that too though the cars or motors may be such as to cause fright to some extent to timid horses. It must, I think, be allowed in such case to judge of the objectionableness, if any, of proposed cars or motors, and whether the inconvenience, if any, resulting to any persons, as causing fright to horses, would be such as to overcome the considerations of public necessity or advantage. Steam fire engines are well calculated to frighten timid horses, yet no one supposes that a city council may not permit them to be drawn upon a street. Many other things may be done in streets, which are calculated to frighten timid horses, but they are not necessarily to be forbidden for that reason. Private convenience must oftentimes yield to what is deemed to be a paramount public convenience. When the city council of the defendant granted permission to use a motor upon one of its street railways, we must presume that it did so because it considered that the public convenience demanded it."

As to compensation to adjoining owners for the occupation of streets by horse-railways see *Attorney-General v. Metropolitan R. Co.*, 125 Mass. 515; s. c., 28 Am. Rep. 264, and note, 269.

The following are the chief cases respecting occupation of streets and highways by steam-railways:

In *Ramden v. Manchester etc. Ry. Co.*, 1 Exch. 523, it was held that a steam railway company had no right to occupy a public highway without first making compensation to adjoining owners.

In *Williams v. N. Y. Cent. R. Co.*, 16 N. Y. 97, it was held that a steam railway company cannot, even under legislative authority and municipal consent, lay down their tracks in a city street, without the permission of the adjoining owners or an appraisal of their damages, although the owners had dedicated the land for the purposes of a street. The court distinguish cases where the fee of the soil is not in the adjacent owners. They also observe: "Are the two uses the same? If the only difference consisted in the introduction of a new motive power, it would not be material. But is there no distinction between the common right of every man to use upon the road a conveyance of his own at will, and a right of the corporation to use its conveyances to the exclusion of all others; between the right of a man to travel in his own carriage without pay, and the right to travel in the car of a railroad company on paying their price? It may be said that the use of the road as a common highway is not subverted; that a man may still drive his own carriage upon it. Without pausing to notice the fallacy of this argument, and the impracticability of the enjoyment of such a right where railroad trains are passing and

Stanley v. City of Davenport.

repassing every half hour. let us look at the subject in another point of view. The right of the public in a highway is an easement, and one that is vested in the whole public. Is not the right of a railroad company, if it has a right to construct its track upon the road, also an easement? This cannot be denied, nor that the latter easement is enjoyed, not by the public at large, but by a corporation; because it will not be pretended that every man would have a right to go and lay down his timbers, and his iron rails, and make a railroad upon a highway. Here then are two easements; one vested in the public, the other in the railroad company. These easements are property, and that of the railroad company is valuable. How was it acquired? It has cost the company nothing. The theory must be that it is carved out and is a part of the public easement, and is therefore the gift of the public. This would do, if it was given solely at the expense of the public. But it is manifest that it is at the joint expense of the public and the owner of the fee. Ought not the latter then to have been consulted? But it is unnecessary to refine upon this case. Any one can see that to convert a common highway, running over a man's land, into a railroad, is to impose an additional burden upon the land, and greatly to impair its value."

The doctrine of the *Williams* case was also laid down in *Imlay v. Union Branch R. Co.*, 28 Conn. 249, approving that case, and *Presbyterian Soc. v. R. Co.*, 3 Hill, 567, relied on in the *Williams* case. The court say: "No one can fail to see that the terms railway and highway are not convertible, or that the two uses, practically considered, although analogous, are not identical. Land as ordinarily appropriated by a railroad company is inconvenient and even impossible, to those who would use it as a common highway. Such a corporation does not hold itself bound to make or to keep its embankments and bridges in a condition which will facilitate the transitus of such vehicles as ply over an ordinary road." "It is illogical to argue, that because a railway may be so constructed as not to interfere with the ordinary uses of a highway, and so as to be consistent with the highway right already existing, therefore such a new use should be included within the old use. It might as well be urged that if a common or a canal, laid out over the routes of a public road, could be so arranged as to leave an ample roadway for vehicles and passengers on foot, the land should be held to be originally condemned for a canal or common, as properly incidental to the highway use. There is an important practical reason why courts should be slow to recognize a legal identity between the two uses referred to. They are by no means the same thing to the proprietor whose land is taken; on the contrary they suggest widely different standards of compensation. One can readily conceive of cases where the value of real estate would be directly enhanced by the opening of a highway through it, while its confiscation for a railway, at the same or a subsequent time, would be a gross injury to the estate, and a total subversion of the mode of enjoyment expected by the owner when he yielded his private rights to the public exigency." The court distinguish *Lex. & Ohio, etc., R. Co. v. Applegate*, 8 Dana, 289, "on the ground that the ownership of the fee of a highway is vested in the public or its representative, instead of the original proprietor. The present decision is founded upon opposite premises."

In *Inhabitants of Springfield v. Conn. River R. Co.*, 4 Cush. 63, it was held that "by a grant of power to lay out a railroad between certain *termini* where the precise course and direction are not prescribed, but are left to the corporation to be located between the *termini*, no authority is given *prima facie* to lay such railroad on or along an existing public highway longitudinally, or in other words, to take the road bed of such highway as the track of their railroad." The Court, SHAW, C. J., said: "The two uses are almost, if not wholly, inconsistent with each other; so that taking the highway for a road-bed will nearly supersede the former use to which it had been legally appropriated."

In *Lerington, etc., R. v. Applegate*, 8 Dana, 289, A. D. 1839, a steam railroad in a city street, the fee of which was not in the adjacent owners, was held not a nuisance or purpresture. The court said: "But even though some persons owning property on the railroad street may be subjected to some inconvenience or even loss by the construction and use of the road, yet if the use of the road be consistent with the purpose for which the street was established, and also consistent with the just rights of all, such persons have no right either to damages or to an injunction, because they purchased their property, and must hold it, as all others purchase and must hold town lots, subject to any consequences that may result, whether advantageously or disadvantageously, from any public and authorized use of the streets, in any mode promotive of and consistent with the purposes of

Stanley v. City of Davenport.

establishing them as common highways in town, and compatible with the reasonable enjoyment of them by all others entitled thereto. As the legislature and the local authorities of Louisville authorized the construction of the railroad through the city, and also authorized the company to employ upon it cars and steam power, and the more especially as such improvements in the means of transportation must be useful to the traveling and commercial public, and in many respects obviously advantageous to the local public of the city itself, it does seem to us that *prima facie* the ordinary and careful use of the road, as thus authorized and prescribed, should not be deemed a nuisance, public or private." This deduction was fortified by a reference to horse-railways and the universal sufferance of them. The court also observe: "If a train of cars occasionally obstructed, in some slight degree, a perfectly free and convenient passage of a private carriage, or wagon, or horse, and produced some apprehension and even damage, successive hacks, or stages, or omnibuses, with the same number of passengers, might perhaps have caused the like obstruction, apprehension and damage." "The onward spirit of the age must to a reasonable extent have its way. The law is made for the times, and will be made or modified by them. The expanded and still expanding genius of the common law should adopt itself here as elsewhere to the improving condition of our country and our countrymen. And therefore railroads and locomotive steam cars, the offspring, as they will also be the parents, of progressive improvement, should not in themselves be considered as nuisances, although in ages that are gone they might have been so held, because they would have been comparatively useless, and therefore were mischievous." This case was approved in *Wolfe v. Railroad*, 15 B. Monr. 404.

In *Phil. and Trenton R. Co.*, 6 Whart. 25, in a case where the fee of a street was in the adjoining lot owners, it was held that the legislature might grant to a steam railroad company the right to lay its tracks in a city street, without making compensation to the adjacent owners who had dedicated the land. The court said: "Were it not for the universality of the public sovereignty, the public lines of communication by railroads and canals might be cut by the authority of every petty borough through which they pass; a doctrine to which Pennsylvania cannot submit, and which it would be dangerous to urge." "An adverse right of soil could not impair the public right of way over it, or prevent the legislature from modifying, abridging, or enlarging its use, whether the title were in the corporation or a stranger." "Neither the part used for the street, nor the part occupied by himself, is taken away from him; and as it was dedicated to the public use without restriction, he is not within the benefit of the constitutional prohibition, which extends not to matters of mere annoyance." In the *Williams* case this doctrine of unrestricted dedication is denied. And in *Monongahela Nav. Co. v. Coons*, 6 W. & S. 117, the case was severely criticised as to its *dictum* that "taking meant taking away altogether;" but its doctrine is approved in *Com. v. Erie, etc., R. Co.*, 27 Penn. St. 339, so far as to hold that the legislature may confer the right of occupancy. In the latter case, the Court say: "If such conversion of a public street to purposes for which it was not originally designed does operate severely upon a portion of the people, the injury must be borne for the sake of the far greater good which results to the public from the cheap, easy and rapid conveyance of persons and property by railway. The commerce of a nation must not be stopped for the convenience of a neighborhood. But we can say this only in cases where the authority has been given by the sovereign power of the State. That any private individual or incorporated company, not empowered to do so by an act of the legislature, can take possession of a street and make a railroad upon it without being guilty of a criminal offense, is a proposition which I am sure no lawyer would dream of making." The court cite *Davis v. Hudson River R. Co.*, 7 Barb. 509, but this was a case respecting streets in the city of New York, the fee of which is in the city. In one of the opinions, BLACK, C. J., said: "If a company be authorized to make a railroad, by a straight line, between two designated points, this implies the right to run along, upon or across all the streets or roads which lie in the course of such line." This implied power to occupy a street or highway was denied in *Inhabitants of Springfield v. Conn. River R. Co.*, *supra*, as we have seen. Two of the five judges dissented in the Pennsylvania case.

In *Moses v. Pittsburgh, etc., R. Co.*, 21 Ill. 516, it was held that a steam railway company might, by legislative, and municipal authority, lay its rails and operate its

Stanley v. City of Davenport.

road in a city street, without compensation to the adjacent lot owners, the fee of the streets being in the city. The court said: "It must necessarily happen that streets will be used for various legitimate purposes which will to a greater or less extent discommode persons residing or doing business upon them, and just to that extent damage their property, and yet such damage is incident to all city property, and for it a party can claim no remedy. The common council may appoint certain localities where hacks and drays shall stand waiting for employment, or where wagons loaded with hay or wood or other commodities shall stand waiting for purchasers. This may drive customers away from shops or stores in the vicinity, and yet there is no remedy for the damage. A street is made for the passage of persons or property; and the law cannot define what exclusive means of transportation and passage shall be used. Universal experience shows that this can best be left to the determination of the municipal authorities, who are supposed to be best acquainted with the wants and necessities of the citizens generally. To say that a new mode of passage shall be banished from the streets, no matter how much the general good may require it, simply because streets were not so used in the days of Blackstone, would hardly comport with the advancement and enlightenment of the present age. Steam has but lately taken the place, to any extent, of animal power for land transportation, and for that reason alone shall it be expelled the streets? For the same reason camels must be kept out, although they might be profitably introduced. Some fancy horse or timid lady might be frightened by such uncouth objects. Or is the objection not in the motive power used, but because the carriages are larger than were formerly used, and run upon iron and are confined to a given track in the street? These street railroads must not be admitted — they have large carriages which run on iron rails and are confined to a given track. Their momentum is great and may do damage to ordinary vehicles or foot passengers. Indeed we may suppose or assume that streets occupied by them are not so pleasant for other carriages or so desirable for residences or business stands, as if not thus occupied. But for this reason the property owners along the street cannot expect to stop such improvements. The convenience of those who live at a greater distance from the center of a city requires the use of such improvements, and for their benefit the owners of property upon the street must submit to the burthen when the common council determines that the public good requires it. Cars upon street railroads are now generally if not universally propelled by horses, but who can say how long it will be before it will be found safe and profitable to propel them with steam, or some other power besides horses? Should we say that this road should be enjoined, we could advance no reason for it which would not apply with equal force to street railroads; so that consistency would require that we should stop all. Nor would the evil which would result from the rule we lay down stop here. We must prohibit every use of a street which discommodes those who reside or do business upon it, because their property will else be damaged." In *Indianapolis, etc., R. Co. v. Hartley*, 67 Ill. 439; s. c., 16 Am. Rep. 624, it was held that the adjacent owner, owning also the soil of the street, might recover damages for injuries to his property by the laying and operating of a steam railway in the street.

In *Indianapolis, etc., R. Co. v. McAhren*, 12 Ind. 552, it is held that "the appropriation of a public street to the use of a railroad is not a taking of the private property of the owners of the adjoining lots, within the meaning of the statute giving that remedy. The action must be one for damages for an injury as at common law, if one lies at all."

In *Milburn v. City of Cedar Rapids*, 12 Iowa, 246, it was held that a steam railway upon a city street is not a public nuisance. But here the fee of the streets was in the city. The court distinguish *Milbau v. Sharp*, 27 N. Y. 611, which was a horse railway case, and profess to distinguish the *Williams* case, *supra*, but do not. On the general question they say: "Now the law-making power of this State has thought proper, as we construe the statute, to give to railroad companies the right to construct their railways upon the streets of cities; and they have invested the local government of those cities both with the fee of the soil of the streets and the exclusive control over the same; and if in the exercise of their proprietary rights and police regulations over the streets they should determine that iron rails and their use are a legitimate street improvement, upon what ground can this court determine otherwise, or control their authority in this respect? We apprehend none, for the reason that both the company and the city have derived their rights and privileges in the premises from the sovereign power of the State, which cannot

Stanley v. City of Davenport.

be supposed to authorize that which would amount to a nuisance." "The leading idea or argument running through these authorities is, that the dedication of streets in a city to a public use is without restriction, as it respects the right of way or mode of transit; that they are necessarily subjected to purposes far more extensive than common highways; that the very large control given to city governments over their streets carries with it the powers of modifying, abridging and enlarging their use in the way that shall best subserve the interest and business of the city; that the laying down and operating of railway tracks over a part of a street is not an unreasonable obstruction of its free use, nor incompatible with its original dedication, but rather a new and improved method of using the same, germane to their principal object, as a passage-way, marking the progress of civilization in this age, and to which the genius of the law readily accommodates itself, as should also the genius and habits of the people." The same doctrine was held in *City of Clinton v. Cedar Rapids, etc., R. Co.*, 24 Iowa, 455; the court depending upon *People v. Kerr*, 27 N. Y. 188 (which, however, was a horse railway case), and DILLON, C. J., remarking: "As to a highway in the country or a street in a city, where the fee is in the adjoining owner, I am not prepared to say that to lay a railroad down upon it is not an additional burden for which such proprietor is entitled to compensation;" and as to the right of railroad companies "to occupy highways in the country and streets in the city *lengthwise*," under the statute, "I only observe, that if the question were an open one, I do not believe I could consent to that construction of the act." This decision was followed in *Chicago, etc., R. Co. v. Mayor of Newtown*, 36 id. 299.

In *State v. Inhabitants of Trenton*, 36 N. J. 79, it was held that a common council of a city have no authority, under the general power to regulate streets, to grant to an individual a license to lay a railroad track across a public street for his own use.

In *Atchison & Nebraska R. Co. v. Garside*, 10 Kan. 552, where the fee of the streets was in the city, it was held that a steam railway company having authority from the city, may construct and operate its road over streets and public grounds without compensation to the abutting lot-owners for the use of the same, and without being liable to such lot-owners for consequential damages arising from noise, smoke, offensive vapors, sparks, fires, shaking of the ground and other inconveniences and annoyances, where the railroad is operated in a legal and proper manner, and in fact it may so construct and operate its road without being liable to said lot-owners for any damages where the road is constructed and operated in a legal and proper manner; but where the property is a street or highway, the railway company will be liable to any person who may receive actual injury from the illegal or unnecessary blocking up or obstructing of such street or highway by the railroad company, whether the obstruction be permanent or only temporary.

To precisely the same effect is *Grand Rapids & Ind. R. Co. v. Heisel*, 38 Mich. 62; 31 Am. Rep. 806.

In *Sherman v. Milwaukee, etc., R. Co.*, 40 Wis. 645, it is held that a steam railway cannot occupy a common highway without compensation to the adjacent owners. In *Pomeroy v. Milwaukee, etc., R. Co.*, 16 Wis. 640, it was held that the common council of a city cannot give a steam railroad company the right to take and use a street of the city for the track of its road, without making compensation to the adjoining lot owners. This is the exact doctrine of the principal case.

In *Porter v. North Mo. R. Co.*, 33 Mo. 123, it was held that the use by a steam railroad company under authority of its charter, of a city street in its ordinary use as a means of travel and transportation, is not a perversion of the highway from its original purposes. The court distinguish *Lackland v. R. Co.*, 31 Mo. 181, on the ground that there was in that case an entire conversion and blocking up of the street, and it was held that this could not be allowed, whether the lot-owner owned to the center of the street or not. It does not distinctly appear in the former whether the plaintiff owned to the center, but we infer that he did. The *Lackland* case came up again in 34 Mo. 259, and it was there held that the company was liable to the adjoining proprietor only for using the street in an illegal manner. The court said: "Every use of a highway is in one sense an obstruction; if a wagon, or other obstruction, or other ordinary vehicle, occupy a place in a highway. It for a time obstructs the space occupied by it, and excludes other uses of the same spot; and such obstruction is entirely legitimate, if the occupation of the highway be according to the usual manner; and a person damaged by such use of the highway would have no

Gerdes v. Weiser. Boone County v. Jones.

ground of action against the owner of the wagon; but the occupation of the highway might be so prolonged, or otherwise improperly managed, as to subject the owner of it to an action for damages caused thereby."

In *Curll v. Stillwater St. Ry. & Transfer Co.*, Minnesota Supreme Court, Oct 1881, it was held that the construction and maintenance by the defendant, under a city ordinance, upon a public street, of a railroad operated by animal power, for the main purpose of transferring freight cars from the terminus of one railroad to that of another in the city, is the imposition of an additional servitude upon the street that entitles the servient owners to compensation.

Judge DILLON correctly states the doctrine in *Mun. Corp.*, §§ 555, 556, 557: "It has often been decided and is settled that the legislature has the power to authorize the building of a railroad on a street or highway, and may directly exercise this power or devolve it upon the local municipal authorities. If the fee in the streets or highways is in the public or in the municipality in trust for public use, and is not in the abutter, the doctrine seems to be settled that the legislature may authorize them to be used by a railroad company in the construction of its road without compensation to adjoining owners, or to the municipality and without the consent and even against the wishes of either. But where the public have only an easement in the street or highway it has been generally but not always held that against the proprietor of the soil the use of the street or highway for the purpose of a steam railroad is an additional burden, which under the Constitution of the different States cannot be imposed by the legislature without compensation to such proprietor for the new servitude."

GERDES V. WEISER.

(54 Iowa, 591.)

Parent and child — step-father and step-child.

A step-father who receives his step-child into his family and keeps him as a part of it, cannot recover for his support.

THIS case is sufficiently reported in note, 36 Am. Rep. 256.

BOONE COUNTY V. JONES.

(54 Iowa, 609.)

Surety — evidence — settlement by principal.

In an action on a county treasurer's bond, the principal's accountings and settlements, made in pursuance of law, are conclusive against him and his sureties, in the absence of mistake. (*See note, p. 234.*)

ACTION on a county treasurer's bond. The opinion states the point. The plaintiff had judgment below.

Maxwell & Witter and Kidder & Crooks, for appellants.

Webb & Dyer and Phillips, Goode & Phillips, for appellee.

ROTHROCK, J. [Omitting minor considerations.] The bond in suit was approved on the 18th day of November, 1876. The law requires the board of supervisors at their regular meetings in January and June of each year to make a full and complete settlement with the county treasurer. No record was made of such settlement in January, 1877; that is, the proceedings of the board make no reference to such settlement, and we are aware of no statute requiring such record, unless it be that it should be included in the record of the proceedings. But the books of the treasurer were introduced in evidence, and although none of their contents are contained in the abstract, it seems to be conceded that they show a settlement—that is, the accounts for the year 1876 were closed up by Jones charging himself with the amounts to balance, and the balances were by him carried forward into his accounts as treasurer for the year 1876, as so much cash on hand. That there was a settlement at that time with Jones, and an accounting with all of the members of the board present, and a balancing of the books, appears in evidence. Upon that settlement it appears that Jones was not a defaulter—his account showed that he had on hand all the money he was required to have. It must be presumed the members of the board did their duty by counting the money which his report showed should be on hand.

The defendants offered to prove from the books that Jones could not have been a defaulter in any sum at the time his bond was given by showing that after that time he paid out more money than he received, and offered to prove that on the 18th day of November, 1876, when the bond was given, and before that, there were deficits in the treasurer's accounts. They also offered to prove how much money there was in the treasurer's office on that day. All this evidence was excluded on the objection of the plaintiff, upon the ground that the treasurer and his sureties were bound by the settlement made in 1877, and the settlements after that as shown from his books, and that they were thereby estopped from showing that the defalcation existed before the bond was given. The defendants also asked that several instructions be given to the jury to the effect that the defendants were only liable upon the bond for such defal-

Boone County v. Jones.

cations as occurred after the bond was given, which instructions were refused.

These rulings of the court are claimed to be erroneous, and the question as to their correctness is the main point in controversy in the case. Counsel for appellant cite a large number of authorities to the effect that where an official bond is not retrospective the sureties thereto are only bound for the public money in the hands of the officer when the bond was executed, and for that which subsequently came into his possession, and cannot be held for past derelictions of duty by their principal. That the proposition is correct can admit of no question. It has been repeatedly so held by this court. *Mahaska County v. Ingalls*, 16 Iowa, 81; *Bessinger v. Dickerson*, 20 id. 261; *Warren County v. Ward*, 21 id. 84; *School District v. McDonald*, 39 id. 564.

But the question we are called upon to determine in this case is the admissibility of the offered evidence to show the fact as to when the defalcation or embezzlement occurred. In *State v. Grammier*, 29 Ind. 531, it is said: "It is true that the sureties of a public officer in the absence of special agreement are only liable for a defalcation of their principal during the term of office covered by the bond, but what shall be received as proof of such defalcation is quite another question." In determining the question as to whether the officer and his sureties should be estopped from contradicting the reports of the treasurer and the settlements made by him with the board of supervisors we are controlled largely by the statute in force in this State requiring such settlements to be made. Before citing the statute, however, it may be proper to say that upon a careful examination of the authorities cited by counsel for appellants we have found no case exactly in point. They are for the most part cases which determine the general proposition that a surety is not liable for derelictions of his principal before the date of the bond, and the question of estoppel based upon settlements with the officer does not appear to have been under consideration. We have seen that the law requires the settlements to be made with the treasurer in January and June of each year. Suppose that he should refuse to make such settlement, or it should appear by an examination of his books and the counting of his cash that he was a defaulter; he would be liable to be removed from office. Code, § 746. He would also be liable to prosecution for the crime of embezzlement. Now suppose at the time of settlement he should show

Boone County v. Jones.

by his books and by the money in the vaults of the treasury that he was not a defaulter, has the county the right to rely upon such showing? Or can he by false statements of account, or by borrowing money temporarily to be counted in settlement, mislead the board of supervisors and avoid proceedings against him, or possibly the demand for an additional bond, and then when sued upon his bond show that his settlement was a fraud upon the county, and that the defalcation actually occurred during a former term? We are clearly of the opinion that he cannot. By allowing such contradictions of these settlements courts would open the doors to escape from liability upon almost every official bond. By shifting the defalcation back to a former term, the Statute of Limitations would in most cases preclude all hope of recovery unless when a defaulting treasurer who has held successive terms should be sued upon all his bonds, and then the shifting process could well be applied to each case. We think the question has every element of estoppel, and that to hold such evidence competent would not only be to allow the treasurer to take advantage of a wrong by which he deceived the county to its injury, but would be contrary to public policy.

In *McCabe v. Rainey*, 32 Ind. 309, it is well said that "a party will be concluded from denying the truth of his own admissions, which were intended to influence the conduct of another, and did influence it, when such denial will operate to the injury of the latter."

In *Baker v. Preston*, 1 Gilmer (Va.), 235, a proceeding against a defaulting treasurer and his sureties, it was held that the books kept by the treasurer were conclusive evidence of the balance actually in the treasury at any given time, both against the treasurer and his sureties without being pleaded as an estoppel, so as to charge them with balances carried forward from year to year. See, also, *State v. Grammier*, 29 Ind. 531, where the last above case is cited with approval; *Morley v. Town of Metamora*, 78 Ill. 394, and *Gage v. City of Chicago*, 2 Bradw. 332.* It is true, that in the last above cited cases, the settlement or statement made by the officer was made at or before the dates of the bonds, but we think they are in principle the same as the case at bar, because the statute requires these settlements to be made at stated periods. They are conclusive that up to the time they were made no defalcation existed. It will, of course be understood that the rule we here announce would not

* Reversed, 9th Ill. 508; s. c., 35 Am. Rep. 182.—*REP.*

Boone County v. Jones.

preclude the officer and his sureties from showing, in a proper case, that there were mistakes in his books and settlements ; but no such case is presented in this record.

IV. The sureties can make no defense that could not be made by their principal. As is said in *Patterson's Appeal*, 48 Penn. St. 342. "The measure of his responsibility is the measure of theirs," and in *McCabe v. Rainy*, 32 Ind. 309, it is said "any act of the principal which estops him from setting up a defense personal to himself, operates equally against his surety." See, also, *Seaver v. Young*, 16 Vt. 658, and *Charles v. Hopkins*, 14 Iowa, 471.

We have determined all the questions made by counsel for appellants, necessary to a determination of the case. When the court below determined, as we think, correctly, that this was a valid and legal bond, and that the parties thereto were bound by the settlement and squaring up of the treasurer's books in January, 1877, the case was reduced to the single question as to the amount of the embezzlement. That this was correctly found by the jury, does not seem to be seriously questioned.

Judgment affirmed.

ON REHEARING.

ADAMS, C. J. The appellants in their petition for a rehearing claim that the court made a mistake in the facts relied upon by the appellee, as constituting the ground of estoppel. We have accordingly re-examined the abstract, and have reached a conclusion not essentially different from that reached in the original opinion.

The undisputed evidence is, as we understand it, that on the first of January, 1877, Jones was debited with the amount which the previous receipts exceeded the previous payments. Such debit then showed the amount which ought to be in the treasury. The precise language in which the debit entry was made is not shown to us. In the absence of such showing we should not perhaps be justified in assuming that the entry expressly purported to show that the money was in the treasury. On account of this fact, we have had some doubt as to the effect which should be given to the entry as a ground of estoppel.

In *Gage v. City of Chicago*, 2 Bradw. 332,* a case strongly relied upon by the appellee, the entries expressly purported to show the "balance in the treasury." We have come to the conclusion how-

*Reversed, 95 Ill. 593; s. c., 85 Am. Rep. 182. REP —

Boone County v. Jones.

ever that the case at bar is not essentially different. The theory upon which the estoppel is based is that the natural effect of the entry was to mislead the board of supervisors, and lull them into security. Now inasmuch as the balance carried forward and debited to the treasurer ought to be in the treasury, and would be in the treasury in the absence of defalcation, the natural inference to be drawn from the entry would be that the money was there. We do not say that it was not the duty of the board of supervisors, at their semi-annual settlement, to count the money, and ascertain whether the amount called for by the books was in the treasury. We think such was their duty. Possibly they counted the money and found it there. If so the sureties are liable. But conceding that the supervisors were guilty of laches in this respect we do not think the sureties can escape liability by reason thereof. They knew that their undertaking, *prima facie*, was that their principal would account for all balances carried forward, and that the tendency of such entries was to mislead the supervisors, and lull them into a false security, if the money called for by the entries was by reason of previous defalcations not in fact in the treasury. They should therefore have counted the money themselves, and if they found that their undertaking appeared from the books to be greater than they were willing to acknowledge it to be, they should, we think, forthwith, certainly before any settlement with the board, have notified it of such fact. The treasurer's books should at all times show the exact condition of the treasury. If in the case at bar there was a shortage at the beginning of 1877, the debit balance carried forward should have shown how much thereof was shortage. But the debit balance it appears was carried forward in such a way as to conceal the shortage, if there was any, and the sureties apparently, at least, acquiesced in the account. The former opinion is adhered to, and the judgment is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER. — The leading case in this country on this point is *Baker v. Preston*, 1 Gilm. 285, holding that the account books of a public treasurer are conclusive against him and his sureties. As to the principle they say "it may be a matter of primary convenience and accommodation." As to the sureties: "If a judgment against him is to bind them, so also is the evidence on which that judgment is rendered." "Sureties are not to be permitted to try over again cases already decided against the principal: nor when tried against them in the first instance, to avail themselves from evidence which the principal himself would be inhibited from using." The court cited *Moody v. Thurston* 1 Str. 481, where a statement of balances made by commissioners under an act of parliament was held conclusive; but there the parties had had their day in court, and the

Boone County v. Jones.

sureties were estopped by a *quasi* judgment. In *Baker v. Preston*, WHITE, J., delivered a strong dissenting opinion, observing: "I am aware that the confession of a party may be given in evidence against him, and is not evidence for him; but when it is so given, although it be strong, it is not so conclusive as to prostrate his rights against the truth of the case; but he is at liberty to show by other testimony that he made the statement under a mistake, through misunderstanding or inadvertence." "No case has been adduced to show they work an estoppel; no dictum of any judge, lawyer, or writer, has been referred to, as even intimating such a doctrine, and I undertake to say that there is none." "Such an idea was never conceived in any of the numerous cases decided." "They are evidence of a high and solemn nature, and should only be outweighed by direct and decisive testimony. But that they are to shut out, or were ever intended to shut out the daylight of truth, I do not and cannot believe." "The old and odious doctrine of estoppel, for odious I must call it, since it is so held in every book in which it is mentioned; an estoppel too applied to a new subject, in an entirely new way." "The books work no estoppel as to the Commonwealth; she may contradict the books. The old-fashioned estoppels, even in the sternest periods of the English law, were reciprocal; both parties were estopped, or neither." Considerable criticism has been made of this case in Virginia, as in *Mumford v. Overseers*, 2 Rand. 314; in *Craddock v. Turner's adm'r*, 6 Leigh, 116, where it was said: "That opinion has certainly not been very acceptable to the profession. It was most ably combated at the time by one of the most distinguished judges of the general court," etc.

The doctrine of the principal case was held in *State v. Grammer*, 29 Ind. 530. The court simply say: "Any other ruling would open the door to great frauds on the public." Of *Baker v. Preston*, they say, "We regard the reasoning in that case as entirely satisfactory, and we know of no case holding a contrary doctrine."

To the same effect, *Morley v. Town of Metamora*, 78 Ill. 394; s. c., 20 Am. Rep. 266; *City of Chicago v. Gage*, 95 Ill. 593; s. c., 35 Am. Rep. 182.

The contrary was held in *U. S. v. Boyd*, 5 How. 50. The court said: "The accounts rendered to the department of money received, properly authenticated, are evidence in the first instance of the indebtedness of the officer, against the sureties; but subject to explanation and contradiction. They were responsible for all the public moneys which were in his hands at the date of the bond, or that may have come into them afterward, and not properly accounted for; but not for moneys which the officer may choose falsely to admit in his hands in his accounts with the government. The sureties cannot be concluded by a fabricated account of their principal with his creditors; they may always inquire into the reality and truth of the transactions between them." But in *U. S. v. Girault*, 11 id. 22, it was held, that a plea was had which alleged that the principal had made returns admitting the receipt of moneys which really he never had received. The *Boyd* case was distinguished on the ground that the returns had been made before the execution of the bond, and the sureties were not responsible for this fraud, and were not estopped by the admission of what occurred before they became answerable. (Such were the cases of *Freeholders of Warren v. Wilson*, 1 Harr. 110; *Inhabitants of Rochester v. Randall*, 105 Mass. 285; s. c., 7 Am. Rep. 519; *Vivian v. Otis*, 24 Wis. 518; s. c., 1 Am. Rep. 199.) In *U. S. v. Eckford's Ex'rs*, 1 How. 250, 263, it was held, where a collector, holding several terms, with different sets of sureties, rendered returns upon which charges were made in the treasury books against him, that "the amount charged to the collector, at the commencement of the term, is only *prima facie* evidence against the sureties. If they can show, by circumstances or otherwise, that the balance charged in whole or in part had been misapplied by the collector prior to the new appointment, they are not liable for the sum so misapplied."

The contrary of the principal case was held in *Nolly v. Callaway County Court*, 11 Mo. 447. (Followed in *State v. Smith*, 26 id. 226.) But little consideration of the point is expressed. The same is true of *Hatch v. Inhabitants of Attleborough*, 97 Mass. 533, where the town treasurer had included in his returns moneys voluntarily contributed by citizens for soldiers' bounties, and for which he was not officially responsible.

So in *State v. Fullenwider*, 4 Ired. 364, it was held that "a surety cannot in general be affected by evidence of an admission made by his principal, except it be a part of his contract, as that accounts kept by him shall be true." This was the case of sureties on a constable's bond. The court cite *Evans v. Beattie*, 5 Esp. 26, where "Lord ELLENBOROUGH held.

Boone County v. Jones.

that where the defendant had guaranteed the payment of such goods as should be delivered to C., the receipt for the goods, or his declaration that they had been delivered, was not admissible against the defendant, for his contract was to pay for goods delivered, and not for such as C. might acknowledge to have been delivered; and therefore he had a right to have the fact proved." So of admissions of embezzlement made by the principal. *Smith v. Whittingham*, 6 C. & P. 78; *Middleton v. Melton*, 10 B. & C. 817; *Goss v. Watlington*, 3 Brod. & B. 133; *McGahey v. Alston*, 2 M. & W., 213.

The doctrine of the *Fullenwider* case was previously laid down in *Governor v. Sutton*, 4 Dev. & Bat. 484, in precisely such a case. The court said of a list made by the principal, "it was *prima facie* evidence against him — and perhaps his sureties — of all that it admitted; but it did not preclude him or them from showing there were mistakes in it."

So in *Treasurers v. Bates*, 2 Ball. 382, 381, of oral admissions and confessions of judgment by a sheriff. The court said: "The legal presumption is that no one will falsely charge himself. Against him it would be the highest and best evidence, and against his sureties it would be at least *prima facie* evidence, for they are his privies in law, and whatever will in law charge him will charge them. But these admissions and confessions of judgment are only *prima facie* evidence against the sureties. They may show that they were made by mistake, or by fraud and collusion between an insolvent sheriff and his creditors. If the sum admitted or confessed by the sheriff is greater than he was really liable for, this may be shown by the sureties in their defense."

Baker v. Preston was severely criticised in *State v. Rhoades*, 6 Nev. 852. It was there held, that in an action against the sureties on the State treasurer's bond, to recover for a defalcation, evidence is admissible to show that the defalcation occurred previous to the giving of the bond. Of *Baker v. Preston* the court said: "We are aware that in the case of *Baker v. Preston*, 1 Gilmer, 135, it was held that the entries in the books of a State treasurer were conclusive upon him and his sureties, to the extent that they would not be allowed to show that any sum, which was shown by them ought to be in the treasury at any given time, was not there. This very singular decision is not relied on by counsel for the State (although sustaining the ruling of the court below on this point), perhaps for the reason that they do not consider it law. And surely, were it not for the distinguished ability of the judge to whom the opinion is attributed, it would not deserve a moment's consideration. That it was rendered by Judge ROANE is the only merit which it is possible to discover in it. The fallacy of the position taken by the majority of the court was very clearly shown by Judge WHITE, in a dissenting opinion of unanswerable logic and crushing force. Little, if any thing, can be added to what was said by him in opposition to the conclusion of his associates. Neither has the decision been considered law, if not directly overruled, even in Virginia. Its authority seems to have been questioned," mentioning the *Mumford* and *Cradock* cases, and concluding: "The case, indeed, stands alone, and is at variance with all the cases we have been able to consult, both American and English. We cannot, therefore, rely upon it as authority here."

Baker v. Preston and *State v. Grammer* were explicitly condemned in *State v. Newton*, 33 Ark. 276, where the State treasurer's accounts rendered were held only *prima facie* evidence against the sureties. SMITH, Sp. J., said: "It is well-settled that they are open to explanation and consideration;" citing *U. S. v. Boyd and Hatch*, *Attleborough*, *supra*.

As to the force in evidence against the sureties of a judgment against the principal, see *Stephens v. Shafer*, 48 Wis. 54; s. c., 33 Am. Rep. 793, and note, 802; *Graves v. Bulley*, *post*.

We are inclined to think the weight of authority is against the principal case.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

HERSHFIELD V. CLAYLIN.

(35 Kans. 166.)

Partnership — levy on individual partner's interest in firm's property.

Partnership property may be seized on attachment or execution against an individual partner, and his interest therein may be sold. (*See note, p. 240.*)

ACTION of damages. The opinion states the fact. The defendant had judgment below.

E. Stillings and Thos. P. Fenlon, for plaintiff in error.

Wm. McNeill Clough, for defendants in error.

VALENTINE. Jacob Hershfield, who is the plaintiff in error, and who was the plaintiff below, and Julius Steinback, owned 1,875 head of cattle. They owned these cattle in the capacity of co-partners, but their ownership seems also to have partaken of the nature of a tenancy in common. Steinback owned a two-thirds interest in the property, and Hershfield owned the other one-third interest, the whole of the partnership property, however, being subject first to the payment of the partnership debts. H. B. Claffin & Co., who are the defendants in error, and who were the defendants below.

caused the United States marshal for the district of Kansas to levy an attachment upon these cattle as the individual property of Steinback, and to take the property into his possession. Afterward, at the instance of Hershfield, the property was delivered to a receiver appointed by the United States Circuit Court, in a suit instituted by Hershfield. Afterward Hershfield commenced this action in the District Court of Leavenworth county against H. B. Claflin & Co. for damages for causing the seizure of said cattle by the United States marshal. The decision of the court below was against the plaintiff and in favor of the defendants, and the plaintiff now, as plaintiff in error in this court, seeks a reversal of that decision.

The only question involved in this case, as seems to be admitted by the plaintiff in error, is whether an officer holding an attachment against the property of an individual partner can seize and hold all or any of the specific property of the firm. All the firm property however in this particular case, seems to have been seized and held by the officer.

Mr. Parsons, in his work on Partnership, says that the officer cannot so seize and hold the partnership property. *Parson on Part.* 352 to 363. He seems however to found his opinion more upon reason, and the logic of the case, than upon the authorities. It seems that he thinks the officer can seize only the individual interest of the partner, leaving the partnership firm to continue in business, to hold all the partnership property, and to deal with it as though no writ of execution or attachment had ever been issued or served. What Mr. Parsons says however relates more particularly to the seizure of property on execution, and not to the seizure of property on attachment. But we should think that the same rule will substantially apply in both cases. Mr. Freeman, in his work on Executions, says that upon correct principles the seizure of specific partnership property cannot be upheld, but that the weight of authority is nevertheless otherwise, and that a majority of the decisions seems to authorize the seizure of such property. *Freeman on Executions*, p. 404, § 254 ; p. 169, § 125. Mr. Herman in his work on Executions, says that the specific property of individual partners may be seized and held ; and he refers to a large number of decisions in support of that proposition. *Herman on Executions*, p. 540 *et seq.*, §§ 356, 357. Mr. Wells, in his work on Replevin, says that the officer must seize the partnership property, but can sell only the partner's interest ; and that the purchaser at

Hershfield v. Claflin.

the sale will become a *quasi* tenant in common with the other partners. Wells on Replevin, p. 92, §§ 164 to 167. All the authorities seem to agree that where property is held by tenants in common, that the officer should seize and hold the property, although the writ may run against only one of the tenants in common.

We refer also to the following decisions, holding that an officer having a writ against an individual partner may seize and hold specific property belonging to the partnership firm: *Moore v. Pennell*, 52 Me. 162; *Russ v. Fay*, 29 Vt. 381, 386; *Branch v. Wiseman*, 51 Ind. 3; *White v. Jones*, 38 Ill. 160; *Andrews v. Keith*, 34 Ala. 727; *Wiles v. Maddox*, 26 Mo. 77. Also see the authorities cited by counsel for defendants in error, including Story and Collyer on Partnership. *Phillips v. Cook*, 24 Wend. 389; *Allen v. Wells*, 22 Pick. 450; *Douglass v. Winslow*, 20 Me. 89; *Pierce v. Jackson*, 6 Mass. 242; *Burgess v. Atkins*, 5 Blackf. 337; *Commercial Bank v. Wilkins*, 9 Greenl. 28; Collyer on Partnership, § 822, note 2; Story on Part., §§ 311, 312; *Moore v. Sample*, 3 Ala. [N. S.] 319; *Reed v. Howard*, 2 Metc. 39. See also *Birdseye v. Ray*, 4 Hill, 161; *Waddell v. Cook*, 2 id. 47, and note *a*; *Mersereau v. Norton*, 15 Johns, 179; *Scrugham v. Carter*, 12 Wend. 131; *Morgan v. Watmough*, 5 Whart. 125. All the authorities seem to agree that when a partnership is dissolved, the copartners become tenants in common. 1 Pars. on Cont. 194.

The weight of authority seems to be, that an officer holding a writ of execution or attachment against an individual partner, may levy upon his interest, and may seize and hold partnership property, and may sell the interest of the individual partner in such property. That of course would dissolve the copartnership so far as that property is concerned. And as the sale of the property must dissolve the copartnership to the extent of that property, so must the seizure alone dissolve it, or at least suspend it to the same extent, while the officer holds the property in his custody. Perhaps it would be proper to say that the mere seizure of the property dissolves the copartnership from the time the seizure, on condition that the property shall afterward be sold. This would seem to be clear, if all the partnership property were seized by the officer; for if all the property were seized the partnership could not continue its business while the officer held the property. And the same result would naturally follow if the greater portion of the partnership property should be seized by the officer. And where the part-

ner against whom the execution or attachment is issued owns the larger interest in the partnership, and where it would require the greater portion of the property to satisfy the writ, it would seem to be the duty of the officer to levy upon the greater portion of the property, that is, to levy upon the entire interest of the partner against whom the execution or attachment was issued, and to take the entire property of the firm into his possession.

In the present case the judgment debtor, Steinback, owned a two-thirds interest in the copartnership, and the present plaintiff owned only a one-third interest ; and so far as is shown, these cattle constituted all the property of the copartnership. We think that the marshal had the right to levy upon Steinback's interest, and to take all the cattle into his possession. And after seizing them he had a right to sell Steinback's interest therein. He however gave notice that he would sell the entire property ; but as he did not in fact sell any of the property, and as it was afterward all put into the hands of a receiver, at Hershfield's instance, we do not think that by giving such notice the marshal committed any substantial injury to or against Hershfield's rights for which Hershfield can recover damages against either the marshal or the plaintiff in the attachment. The present suit is against the plaintiff in the attachment. The marshal was not made a party thereto.

The judgment of the court below will be affirmed.

Judgment affirmed.

All the justices concurring.

NOTE BY THE REPORTER.—The contrary doctrine is held in *Hutchinson v. Dubois*, Michigan Supreme Court, Jan., 1881. The following is a statement of the decision :

A sheriff, under an execution against one Van Etten, levied upon and removed specific articles constituting the stock of a livery stable in the possession of one Dubois, on the ground that Van Etten had an interest as partner with Dubois therein. *Held*, that the seizure was wrongful even if Van Etten was partner in the ownership of the property, and Dubois was entitled to maintain replevin therefor against the sheriff. Though Van Etten's interest as partner was subject to his debts, it would not be an interest in the specific articles belonging to the firm, but only an interest in the surplus that should remain after the debts of the firm were paid. *Hankey v. Garrett*, 1 Ves. 236 ; *Taylor v. Field*, 4 Id. 396 ; *Skipp v. Harwood*, 2 Swanst. 586. Meantime his share is not separable from the share of his co-partner, for he has no separate property in the assets of the firm. *Newman v. Bean*, 21 N. H. 93, 98. His share is also subject to the final adjustment of accounts between the partners themselves. *Sirrine v. Briggs*, 31 Mich. 443. If any levy of an execution upon such an interest can be made, it must be so made and enforced as to protect all rights of others. One man's interest must not be sacrificed because another who is associated with him in business happens to be in debt. Specific chattels must not be taken on the execution, because the specific chattels are owned by the firm and not by either of the partners. *Gibson v. Stevens*, 7 N. H. 352 ; *Morrison v. Blodgett*, 8 Id. 238 ; *Treadwell v. Brown*, 43 Id. 290 ; *Brewster v. Hammet*, 4 Conn. 540 ; *Matter of Smith*, 16 Johns. 102 ; *Wiles v. Muldox*, 23 Mo. 77. The utmost extent of the officer's rights—if he can levy at all—must be to seize the interest of the partner, whatever it may

Gibbs v. Williams.

be, subject to all the partnership debts and to the final accounting. *Church v. Knaz*, 2 Conn. 514; *Tappan v. Blaisdell* 5 N. H. 198; *Sirrinc v. Briggs*, 31 Mich. 443, *Knerr v. Hoffman*, 65 id. 126. As was said by CAMPBELL, J., in *Haynes v. Knowles*, 35 Mich. 407, 410; "The partner not sued cannot on any principle of justice be placed in any worse condition by a creditor of his partner than he could have been by his own partner." At most for the purposes of his writ the officer only takes the debtor's place and seizes an interest that can only be measured by final account; *Vandike v. Roskam*, 67 Penn. St. 330. And the action of replevin could not be defeated on the ground that the partner bringing it was not possessed of the entire ownership. Each partner "has an entire as well as a joint interest in the whole of the joint property. A levy then to affect the interest of a partner, cannot touch a specific proportion of the goods nor the whole, because others have property in every part as well as the whole, coupled with a right, vesting in contract, to use them for the purposes for which the partnership was instituted." *Deal v. Bogue*, 20 Penn. St. 228, 233. And see *Atkins v. Sarton*, 77 N. Y. 195. In the latter case the sheriff levied on and seized the entire property of the firm as the sole property of the debtor. Held, invalid. The court however conceded that "the sheriff may take possession of the whole property, and upon a sale may deliver it to the purchaser, who takes it subject to the rights of the co-partners of the debtor, and the creditors of the firm, and subject to an accounting which may disclose that he derived no beneficial interest from his purchase; all that he can ultimately obtain is the debtor's share of such surplus as may remain after payment of the firm debts and the adjustment of the accounts of the partners as between themselves."

In *Randall v. Johnson*, Rhode Island Supreme Court, June, 1881, it was held as follows: The interest of a copartner in the partnership property may be attached by an individual creditor of such copartner. In such a case the sheriff may seize a chattel and deliver it to the purchaser of the interest attached, who becomes a tenant in common of such chattel with the other partners, but subject to the partnership debts and equities. In *Phillips v. Cook*, 34 Wend. 389, *Cowen, J.*, held that the sheriff might seize the whole of the particular article and sell the interest of the debtor in it, and deliver it to the purchaser, who then became a tenant in common with the other partner and took subject to a settlement of partnership accounts and to the equitable claims of the creditors of the firm, and this we think is in accordance with the other decisions on the subject. See, also, opinion of *Nelson, C. J.*, in *Birdseye v. Ray*, 4 Hill (N. Y.), 158, 161, and as to the disposal of the purchase-money and the remedy of the other partner, see *Doner v. Stauffer*, 1 Penn. 193. Although, if the officer sells the whole, it will be as to the co-tenant a conversion. *Ladd v. Hill*, 4 Vt. 164; *White v. Morton*, 23 id. 15; *Bradley v. Arnold*, 16 id. 382; *Walker v. Pitts*, 21 Pick. 191; *Waddell v. Cook*, 3 Hill (N. Y.), 47; *Drake on Attach.*, § 248.

GIBBS V. WILLIAMS.

(35 Kans. 214.)

Water-courses — definition of — surface-water

Where surface-water, supplied by the falling rains and melting snow from a hilly region or high bluffs, by the natural formation of the ground is forced to seek an outlet through a gorge or ravine, and by its flow assumes a definite and natural channel through which it escapes at regular seasons, and such has always been the case within the memory of man, one adjacent land-owner has no right to obstruct such flow, to the damage of another.

But there must be a distinct channel, the bed of a stream, with well defined banks, cut through the turf and into the soil by the flowing of the water; presenting on a casual glance to every eye the unmistakable evidences of the frequent action of running water; and not a mere depression; and such flow must be necessary to prevent the flooding of a considerable tract of land. (*See note, p. 248.*)

ACTION for the obstruction of a water-course. The opinion states the facts. The defendant had judgment below.

F. W. Sturges, for plaintiffs in error.

L. J. Crans and *C. K. Wells*, for defendants in error.

BREWER, J. This was an action in which the plaintiff sought to recover of the defendants for obstructing a water-course, whereby his cellar was flooded and property destroyed. The pivotal question is as to the existence of a water-course, or any thing having so far the attributes of a water-course as to forbid interference with it by the owner of the soil. It is not pretended that there was any constant stream, any general flow of water. Indeed, it is perfectly plain that the only water flowing down this alleged water-course was the temporary accumulation of rainfalls. It was simply a passage way for surface-water. True, there was some testimony tending to show the existence of a couple of springs, but very clearly they were not sufficient to cause running water, or start even a temporary stream. On the other hand, it is equally clear that the configuration of the ground is such that the surface-water, falling upon quite a track of land, flows off through this passage-way. Of course, in time of heavy rains the accumulation forms a large stream of water, for according to some testimony the tract of land whose outflow of surface-water is along this way amounts to from one thousand to twelve hundred acres. This passage-way runs through the city of Concordia. Lots are laid off across it, and the obstruction complained of was in building a store on one of these lots and across this passage-way. It is described as being from three to five feet in depth, and from thirty to fifty feet in width. Across it at one time bridges were built by the city. It is called by various witnesses a ravine, a draw, a depression. Several testified to having run a mowing machine up its bed. Evidently grass was growing throughout most of its extent. There was no general cut

in the soil by the frequent flow of water. It was not a ravine, with sharp and distinct banks.

Now the ordinary rule concerning surface-water is settled and familiar; the lower estate owes no duty to the higher, and the owner of each may use or abandon surface-water as he pleases. "It is not one of the legal rights appertaining to land, that the water falling upon it from the clouds shall be discharged over land contiguous to it; and this is the law, no matter what the conformation of the face of the country may be, and altogether without reference to the fact that in the natural condition of things the surface-water would escape in any given direction; the consequence is therefore that there is no such thing known to the law as a right to any particular flow of surface-water, *jure naturæ*. The owner of land may at his pleasure withhold the water falling on his property from passing on to that of his neighbors, and in the same manner may prevent the water falling on the land of the latter from coming upon his own. In a word neither the right to discharge nor to receive surface-water can have any legal existence except from a grant, express or implied. The wisdom of this doctrine will be apparent to all minds on a little reflection. If the right to run in its natural channels was annexed to surface-water as a legal incident, the difficulties would be infinite indeed. Unless the land should be left idle, it would be impossible to enforce the right in its rigor; for it is obvious every house that is built and every furrow that is made in a field, is a disturbance of such right. If such a doctrine prevailed, every acclivity would be and remain a water-shed, and most low ground become reservoirs. It is certain that any other doctrine but that which the law has adopted would be altogether impracticable. The legal principle, as stated above, is fully established in the following cases: *Greatrex v. Hayward*, 8 Exch. 291; *Rawstron v. Taylor*, 11 id. 369; *Broadbent v. Ramsbotham*, 11 id. 602; *Dickinson v. Worcester*, 7 Allen, 19; *Parks v. Newburyport*, 10 Gray, 28; *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Ashley v. Wolcott*, 11 id. 192; *Shields v. Arndt*, 3 Green, Ch. 234." *Bowlsby v. Speer*, 31 N. J. 352.

This rule is both just and wise. It gives to each owner the fullest dominion over his own land, the largest liberty of improvement of that land according to the necessities of his business and the dictates of his judgment. It enables each to use and accumulate all the water falling upon his own land — a right of no small

value in a State like ours. For it is a frequent thing for farmers on the upland prairies, away from streams, to throw up a little wall of earth at the lower side of their farms, and thus obtain a pool of stock-water supplied entirely from the fall of rain. But wise or unwise, it has become a settled rule, and may not be disturbed save by legislative action. Like other general rules, it has some exceptions, and the effort was to bring this case within one of those exceptions—the one noticed by this court in the case of *Palmer v. Waddell*, 22 Kans. 352. In reference to this exception the District Court charged as follows:

“ ‘The rule that the owner of a tract of land may obstruct the flow of surface-water across his land appears to and does have an exception, which is where surface-water, having no definite source, is supplied from the falling rains and melting snow from a hilly region or high bluffs, and owing to the natural formation of the surface of the ground is forced to seek an outlet through a gorge or ravine, and by its flow assumes a definite or natural channel, and escapes through such channel regularly during the spring months of every year and in seasons of heavy rains ; and such has always been the case so far as the memory of man runs.’ ” The language just read is that of the Supreme Court of this State, and you are instructed that the word ‘gorge,’ as here used, means a defile between hills or mountains—that is a narrow throat or outlet from a region of country. If therefore a man owns a piece of land upon which there is a gorge as thus defined, he has no right to dam it up so as to destroy or injure the region of country to which such gorge is an outlet. A ravine is defined by Webster to be a deep and narrow hollow, usually worn by a stream or torrent of water ; a gorge ; a mountain cleft. The language which I have heretofore cited to you from the opinion of the Supreme Court as creating an exception to the general right of a party to obstruct the natural flow of surface-water, must be taken to mean that where the outlet to the surface-water which falls on a considerable region of country is over a tract of land owned by a person, and such water has worn a well-defined channel over the land of such person, and such land lies between hills, so that there is no other natural or reasonable outlet for such surface-water, then the person owning the said tract may not dam up such channel and flow the water back on lands situated above. But if a channel which conducts surface-water only runs through a level tract of country, where there is room for such surface-water

Gibbs v. Williams.

to spread out and flow in other directions, and is not 'forced,' in the language of the Supreme Court, to seek an outlet through a gorge or ravine, then under such circumstances such channel may be obstructed by a person who does so for the purpose in good faith, of the better enjoyment of his own land, and without malicious motives, and he would not under such circumstances be liable for damages which might be occasioned thereby."

Upon this instruction rests the claim of error. And that claim substantially is, that by the explanations and definitions attached to the language of this court, the conditions upon which the exception to the general rule depends were grossly exaggerated, and in fact the exception deprived of any practical application in this prairie State. Counsel says that there are no mountains in Kansas, and that under the District Court's interpretation, the conditions of the exception do not here exist. The ruling of the District Court was correct. The explanation of the language of this court was in view of the facts of the case appropriate, and well calculated to present to the jury the true nature and condition of the exception. We shall not stop to criticise every sentence, nor do we assert that some expressions might not mislead in some cases. But the instruction brings out clearly the distinction which in this case was necessary to guide to a correct conclusion. In this State, outside of a few level bottoms along the Kaw and other streams, the general configuration of the surface is rolling prairie. The elevation is not high and the depression is not deep. These do not run in parallel lines. There is no uniformity in elevation or depression. There is a gradual slope in one direction and another. From this very unevenness and irregularity, it often happens that the surface-water from a large tract tends and flows toward and over a single depression into the creeks and streams. In times of heavy rains a large body of water may thus flow. But this of itself does not make a water-course. The owner of land in this depression is under no legal obligations to receive this flow of water, and may fill up the depression. By so doing, the flow of water is simply spread over a larger surface, or along the next lower depression. There is no large accumulation of stagnant water; no body of tillable land is turned into a swamp and rendered unfit for agricultural purposes. The water is not forced to take this outlet. Deprived of this, it readily flows off in another. On the other hand, it sometimes happens, as in the *Palmer v. Waddell* case, that in a hilly country the melting snows and

falling rains on a large tract form an accumulation of surface-water, which must flow through some defile or gorge between the hills; or if that be closed, must remain on the tract, stagnant water, rendering valuable lands useless. In such cases there appears a public necessity to forbid the obstruction of such channel. And if the defile may not be closed, then the torrent which of right comes through it has acquired so much of the characteristics of a natural stream as to be entitled to flow undisturbed through any distinct and well-defined channel which it may have cut through level lands to the river or lake. Now that which sustains this lower channel is not the fact that much water flows in it, but because of the impossibility of obstruction or dispersion before the stream reaches it. Suppose, for instance, a tract of a thousand acres nearly level, but with a slight incline toward one corner. Undisturbed, quite a volume of water in a heavy rain might accumulate and flow toward this corner—a much larger volume, in fact, than any which would accumulate in a hilly tract of only five hundred acres; yet in the one case it would not be just to call the passage-way across the corner a water-course, for dispersion of the water is easy and without danger of destruction of any considerable amount of land; while in the other, as dispersion would be impossible and the accumulation must form a stream, it might be just to hold it possessed of all the essential attributes of a water-course. In short, the only exception to the rule concerning surface-water is where necessity compels it.

Now in the case at bar the testimony discloses no such hilly country as accumulates a large volume of water and necessarily discharges it in a single stream through a gorge or defile. The general slope and incline doubtless cause a large flow of water in times of heavy rain along this depression, but the surface on either side of it is comparatively level. If it be filled up, the flowing water will simply spread over a wider surface. Indeed, it would seem that since the flood out of which this action arose, the city has partially, if not wholly, filled up this depression, and turned the flow in another direction. There was no danger of flooding any considerable tract of land, none in fact except perhaps a small portion of the depression just above the obstruction. No body of land would be rendered swampy, or unfit for tillage or other use. No interests of agriculture demanded that this passage-way for surface-water should be kept open. Indeed, there was no certainty

that the owners of nearly all the lands drained by this passage-way might not for farm purposes appropriate, and without much difficulty except in case of extraordinary rains, all the surface-water falling on their respective tracts.

Again, for a water-course there must be a channel, a bed to the stream, and not merely low land or a depression in the prairie over which water flows. It matters not what the width or depth may be, a water-course implies a distinct channel, a way cut and kept open by running water, a passage whose appearance, different from that of the adjacent land, discloses to every eye on a mere casual glance the bed of a constant or frequent stream. *Swett v. Cutts*, 50 N. H. 439; s. c., 9 Am. Rep. 276; *Ashley v. Wolcott*, 11 Cush. 192; *Hoyt v. City of Hudson*, 27 Wis. 664; s. c., 22 Am. Rep. 714; Ang. on Water-Courses, 5th ed., § 4; *Barnes v. Sabron*, 10 Nev. 218.

“The banks of a river are those elevations of land which confine the waters, when they rise out of the bed; and the bed is that soil so usually covered with water as to be distinguishable from the banks by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks. The line is to be found by examining the bed and the banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation as well as in respect to the nature of the soil itself. * * * But in all cases the bed of a river is a natural object, and is to be sought for not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearances they present; the banks being fast land on which vegetation appropriate to such land in the particular locality grows, wherever the bank is not too steep to permit such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged in water.” *Howard v. Ingersoll*, 13 How. 427.

It is very clear from the evidence that this depression lacked these essential features of a water-course. Along its bottom the grass grew as elsewhere; a little coarser and thicker, perhaps, but

with that as the only difference. Mowing machines were run in it. The turf was not cut through and a distinct channel worn in the soil by the running water. Doubtless any one looking at it in connection with the surrounding land, and noticing its lower level, would perceive that it was a passage-way for surface-water, but one examining it disconnected from its surroundings would not instantaneously perceive that it was a water-course — that it was a channel cut and kept open by frequent flow of water.

In this respect therefore as in that previously noticed, this passage-way lacked the distinctive attributes of a water-course. We have given this case much examination, and are satisfied that the verdict of the jury is correct; and while as suggested, every expression in the instruction of the court may not be strictly correct, yet it so presented to the jury the distinctions between a mere passage-way for surface-water and a water-course, that they could not have been misled.

We see therefore no error which justifies a reversal of the judgment, and it will be affirmed.

Judgment affirmed.

All the justices concurring.

NOTE BY THE REPORTER.— In *Bowlsby v. Speer*, 81 N. J. 851, the defendant was the owner of land, situate on a hill-side, below which were the premises of the plaintiff. Above the defendant's land was a pond, occasioned and fed exclusively by rain water. In times of rain this pond ran over, and with other surface-water ran down and escaped through a hollow in defendant's land. The defendant erected a stable on his land over this hollow, and thereby caused a portion of that surface-water to run on the land of the plaintiff. *Held*, not actionable. **WHELPLEY, C. J.**, said, in addition to the remarks cited in the principal case: "How far it may be necessary to modify this general proposition in cases in which, in a hilly region, from the natural formation of the surface of the ground, large quantities of water, in times of excessive rains, or from the melting of heavy snows, are forced to seek a channel through gorges or narrow valleys, will probably require consideration when the facts of the case shall present the question. It would seem that such anomalous cases might reasonably be regarded as forming exceptions to the general rule." "Nor does it seem to me that there was any significance in the fact that there was an appreciable channel for this surface-water over the land of the defendant, and into which it naturally run. On every hillside numbers of such small conduits can be found, but it would be highly unreasonable to attach to them all the legal qualities of water-courses. I am not willing to adopt a doctrine which would be accompanied by so much mischief."

In *Barnes v. Sabron*, 10 Nev. 217, it is said: "It appears from the testimony that Current Creek is partly supplied at certain seasons of the year from springs having their rise and flow along its banks and bed, but mostly from the melting snow on the mountains. There is no regularity as to the quantity of water, for, to quote the language of several of the witnesses, 'no two seasons are alike,' the amount of water flowing being dependent upon the character of weather during the preceding winter. After a cold winter, when deep snows have fallen, the water flows in greater quantity and for a longer time than after an open winter with but little snow; hence the amount of water varies in the summer season — according to statements made by different witnesses — from nothing to five thousand inches. There is a conflict of evidence as to the real character of this stream;

Graves v. Bulkley.

the conflict, however, is principally confined to the question, whether the water therein 'continuously flows.' The fact that should have been found by the court below was whether or not Currant Creek was a natural water-course and surface stream. To ascertain that fact it was not necessary to determine whether the water was *continuously flowing*. 'A water-course,' says Angell, 'consists of bed, banks and water; yet the water need not flow continually, and there are many water-courses which are sometimes dry. There is, however, a distinction to be taken in law between a regular flowing stream of water, which at certain seasons is dried up, and those occasional bursts of water which, in times of freshets or melting of ice and snow, descend from the hills and inundate the country.' Angell on Water-courses, § 4. This distinction was entirely ignored by the court below. We are of opinion that the testimony clearly shows that Currant Creek belongs to the first class referred to by Angell; that it is a 'flowing stream of water,' a water-course as distinguished from water flowing through hollows, gulches or ravines only in times of rain or melting snow. The finding, 'that the same is supplied at certain seasons of the year from the snows on the mountains above the valley, and from springs having their rise and flow along the banks and bed of the same,' being sustained by the evidence, gives to this creek the character of a natural water-course, in so far as finding one is involved. It is well settled that in order 'to maintain the right to a water-course or brook, it must be made to appear that the water usually flows in a certain direction and by a regular channel, with banks or sides. It need not be shown to *flow continually*, * * * and it may at times be dry, but it must have a well-defined and substantial existence.' Angell, *supra*."

GRAVES v. BULKLEY.

(25 Kans. 249.)

Surety — judgment against principal — res adjudicata.

In an action under a statute to make the sureties of a sheriff parties to and bound by a judgment of amercement against their principal, such judgment is not conclusive on the sureties, but only *prima facie* evidence of liability. (See note, p. 252.)

ACTION to bind a sheriff's sureties by judgment of amercement. The opinion states the facts. The plaintiff had judgment below.

(*C. W. Johnson*, for plaintiffs in error.

Lucien Baker and William C. Hook, for defendant in error.

HORTON, C. J. [Omitting immaterial statements.] On October 4, 1879, this action was commenced, to make the sureties on Young's official bond, who lived in Brown county, parties to the judgment or order of amercement, under the provisions of section 478 of the Code. The condition of the bond was: "That if the said R. J.

Young shall well and faithfully perform and execute the duties of his office of sheriff of said county during his continuance in office by virtue of his election, without fraud, deceit or oppression, and shall pay over according to law all money that may come to his hands as such sheriff, and shall deliver to his successor all writs, books, papers and other things pertaining to his office which may be so required by law, then the obligation shall be void: otherwise, to be and remain in full force and effect." On January 12, 1880, the sureties filed their separate answers, alleging various matters in defense, and among others, "that without fault or neglect of Young, the execution was lost, and thereafter, on seeking to make a return upon the execution, Young could not, by the most diligent inquiry, find the writ; that, on February 13, 1879, he gave notice to Mrs. Bulkley and her attorney of the loss, and then transmitted to the clerk of the District Court of Leavenworth county a statement of such loss and the proceeds of collections under the writ, which proceeds were applied upon the judgment and costs; that the proceedings to amerce took no notice of such partial satisfaction of the judgment; nor did Young receive credit therefor, but was amerced for the full amount of the judgment and costs, and interest thereon, and ten per cent penalty thereunto added."

Upon the hearing the sureties gave in evidence the written statement of Young of February 11, 1879, on file with the clerk, and the acceptance by Mrs. Bulkley of the money, less the costs, transmitted with the statement. Notwithstanding this proof, the court made the sureties parties to the order and judgment against Young, and adjudged that the plaintiff recover of them the sum of \$1,257 and costs.

[Omitting minor points.]

Counsel for defendant in error further contend that the order or judgment of amercement is *res adjudicata* as to the sureties, and that the latter are not permitted to set up as a defense any matter that occurred previous to the entering of the judgment. This part of the case has given us serious trouble. There is great conflict of authority, and the Ohio cases and several others fully sustain the view of counsel. In this connection we may remark however that the case of *Webb v. Anspach*, 3 Ohio St. 522, to which we are referred as decisive upon this point, went off upon the strained construction of the Ohio statute, that filing a motion in the clerk's

office in vacation and calling it up in court is not the making of a motion in open court.

To our mind the better opinion however is, that except in cases where, upon the fair construction of the contract, the surety may be held to have undertaken to be responsible for the result of a suit, *Kennedy v. Brown*, 21 Kans. 171, or when he is made privy to the suit by notice, and the opportunity is given him to defend it, a judgment against the principal is not conclusive against the surety. This is especially true in the case of official bonds, where the sureties undertake in general terms, as in the bond set forth in the petition, that the principal will perform his official duties, pay over the moneys that may come to his hands, and deliver to his successor the writs, books and papers of his office. They do not agree to be absolutely bound by any order or judgment against them for official misconduct or neglect, nor to pay every such judgment. It is a general principle that no party can be held for a breach of his own obligation without an opportunity to be heard in defense; and in this State it is the policy of the law to allow separate answers, as well as separate defenses. We think there is nothing in the bond executed by the sureties or in the provisions of said section 478, that debars the plaintiffs in error of the right to contest with the defendant in error the question of their liability. Counsel seem to concede that if this were an action on the official bond of the sheriff the sureties might make the defenses which Young could have made, but assert that as this is only a proceeding to make the sureties parties to a judgment, nothing previous to the entering of the judgment can be considered. This construction overlooks some of the provisions of section 478. The proceeding is there denominated an action, to be commenced and prosecuted as other cases. Therefore if we assume the proceeding was properly begun in Leavenworth county against the sureties, we must hold that such proceeding, although a continuation of former proceedings, is, in reality, in the nature of an action as to the sureties sought to be charged, and that such judgment previously rendered against the principal at most is only *prima facie* evidence against the sureties to the bond.

While in an ordinary action upon the official bond, a plaintiff would recover only the damages actually sustained, by seeking his remedy by amercement and then under this statute, he may recover, if he recovers at all, the full amount of his debt, with the addi-

tional penalty, but we do not think it was intended for the statute to cut off the usual defenses of sureties. In *Crawford v. Word*, 7 Ga. 445, it was held that a rule absolute against the sheriff, ordering him to pay over money, is neither an extinguishment of his official security, nor a bar to a suit against his sureties; and that in a suit on the bond, the order is conclusive against the officer, but presumptive evidence only against the sureties; and they were allowed to prove everything *ab origine* which would have protected the officer from liability. In *Shelby v. Governor*, 2 Blackf. 289, an action of debt was brought on a sheriff's bond by the governor, for the use of an execution creditor against the administrator of the sheriff's surety. The *gravamen* was, the sheriff's failure to return the execution. The declaration averred, *inter alia*, that the execution creditor had previously obtained a judgment against the sheriff for the same neglect of duty then complained of. At the trial the plaintiff offered in evidence the previous judgment against the sheriff. The Circuit Court refused to admit the evidence, and the decision was on a writ of error approved of. In *Lucas v. Governor*, 6 Ala. (N. S.) 826, it was declared that a recovery in an action against a sheriff for a false return was no evidence to fix the liability of his sureties, when they were sued upon his official bond. In *Whitehead v. Woolfolk*, 3 La. Ann. 43, which was a bond for the faithful discharge of Conner's duty as receiver, it was held that a judgment ascertaining a balance against him as receiver was not conclusive against the sureties. In *Atkins v. Baily*, 9 Yerg. 111, a judgment by confession of a constable or upon testimony of witnesses was deemed evidence against the sureties of such officer, but not conclusive; and the sureties were adjudged the right to prove or establish such facts as showed that the principal was not liable. See, also, *Taylor v. Johnson*, 17 Ga. 521; *State v. Martin*, 20 Ark. 629; *Giltinan v. Strong*, 64 Penn. St. 242; *De Greiff v. Wilson*, 30 N. J. Eq. 435; *Pico v. Webster*, 14 Cal. 202; Brandt on Suretyship, §§ 1, 524, 525, 530.

The judgment and order of the District Court will be reversed and the case remanded.

Reversed and remanded.

All the justices concurring.

NOTE BY THE REPORTER.—To the same effect, *Stephens v. Shafer*, 48 Wis. 54; 21 Am. Rep. 798, and note, 802. See also *Bonne County v. Jones*, ante.

In *Fay v. Edmiston*, 25 Kans. 489, the same doctrine was held, following the principal case, and it was held that the judgment was open to all defenses. The court said:

Harris v. Lynn.

* Since this case has been filed in this court we have decided that the order or judgment in amercement pleadings against the sheriff is only *prima facie*, and not conclusive evidence against the sureties. *Graves v. Bulkley, ante*, p. 249. That case was pending before us for some months, and was the subject of special examination and study. That decision practically disposes of this case. It settles the main question. It is useless to enter upon any further discussion of it, yet we cannot forbear saying that the counsel in this case have filed very full and satisfactory briefs upon the subject—briefs which would have assisted us materially in our examination. Counsel for defendant in error further urge that—we quote from their brief—in any event, judgments of amercement are *prima facie* evidence against the sureties, and such *prima facie* evidence can only be rebutted by showing fraud, collusion, or mistake in the rendition of the judgment.

"We do not so understand the rule. The order or judgment is *prima facie* evidence against the sureties, and if nothing further is offered, the plaintiff is entitled to a judgment against them; but if they seek to make a defense, that defense is not as to the manner in which the judgment was obtained, but as to the truth of the charge upon which that judgment was based. Conceding that there was no fraud, collusion, or mistake in the judgment as rendered, still it does not follow that judgment must go against the sureties. The sheriff, honestly endeavoring to make a defense, may have omitted some material fact, and so judgment may properly be rendered against him upon the facts as presented; or he may unintentionally but negligently have omitted to make the proper return upon the process in his hands, and leave to amend and correct his return may be refused, and so the judgment be correctly rendered (the question of amendment of return was one of the principal questions in the case as presented in 20 Kans., *supra*), and yet upon the facts as they really existed, the sheriff may not have been guilty of any wrong or chargeable with any amercement. The question is not how the plaintiff obtained his judgment against the sheriff, but are the charges upon which that judgment was based really true? The judgment is *prima facie* evidence of their truth, but not being conclusive, the facts themselves are still open to investigation. So that the original facts are open to inquiry in this action."

HARRIS V. LYNN.

(25 Kans. 281.)

Mortgages of chattels — sale — warranty.

On a sale of chattels, announced as made by virtue of a mortgage, there is no implied warranty of title.

ACTION for breach of implied warranty of title of chattels sold under a mortgage. The opinion shows the facts. The defendants had judgment below.

Hackney & McDonald, for plaintiff in error.

J. E. Allen, for defendant in error.

VALENTINE, J. [Omitting statement.]

The plaintiff in error states in his brief the questions to be considered by this court, as follows:

"The principal question presented by this case is, whether the rule of *caveat emptor* applies to a mortgagee's sale of personal property; for if it does, the ruling of the District Court was probably correct, and if it does not, then said ruling was plainly erroneous. We contend that the rule does not apply to such sales; that on the contrary, in all sales of mortgaged personal property made by the mortgagee thereof, the law implies a twofold warranty—first, of title to the property sold; and second, that he, the mortgagee, has complied with every requirement of law and condition of the mortgage requisite to vest in him the right to sell the property at that time and place, and that he is invested with such right."

We think the decision of the court below upon the demurrer was correct. The doctrine of implied warranty of title in the sale of chattels is thus stated by Sir Wm. Blackstone: "A purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose." 2 Bl. Com. 451. In discussing the same point, Mr. Parsons declares the following principle: "If the seller is in possession, but the possession is of such a kind as not to denote or imply title in him, there would be no warranty of title in England, and we are confident there would be none in this country." 1 Pars. Cont. 575.

At the time of the sale, Lynn was in possession of the property, but his possession was that of a mortgagee, and he publicly proclaimed, at the time of the sale, that he offered it for sale under a chattel mortgage, and as the mortgagee thereof. So that it was evident that he was not selling the property as his own; and that his possession was of such a character as not to denote or imply title in him.

Mr. Schouler, in his treatise on Personal Property, says: "So, too, the sale by the pledgee or mortgagee of a chattel, as such, purports to transfer only the peculiar title of a pawn-broker, pledgee or mortgagee; and the circumstances must repel any inference that a warranty of title as owner is intended, though the title thus originating may have ripened into a good one; and in the absence of express warranty of title, or fraudulent conduct, the transaction will be taken accordingly." 2 Schoul. Pers. Prop. 338.

The same doctrine is also announced in *Sheppard v. Earles*, 20 N. Y. Sup. Ct., 13 Hun, 651, in the following language: "Upon a sale of property, by virtue of a chattel mortgage, the proceeding is

In the Matter of Bort.

notice to the public that the mortgagee is selling, not his own title to the property, but that which he has acquired through the mortgage, and no warranty of title to the property so sold is to be implied against the mortgagee."

In the case of *Morley v. Attenborough*, 3 Exch. 500, it is decided that "there is no implied warranty of title in the contract of sale of a personal chattel; and in the absence of fraud, a vendor is not liable for a defect of title, unless there be an express warranty, or an equivalent to it, by declaration or conduct." "A pawnbroker, who sells a chattel as a forfeited pledge, merely undertakes that the subject of the sale is a pledge, and irredeemable, and that he is not cognizant of any defect of title to it."

[Omitting other questions.]

The judgment of the court below will be affirmed.

Judgment affirmed.

All the justices concurring.

IN THE MATTER OF BORT.

(25 Kans. 208.)

Parent and child — custody of child — divorce in another State.

Parents had been divorced by the decree of a Wisconsin court, for the fault of the wife, and the custody of the children had been decreed to the father. The children, respectively four and five years old, were in the care of the mother, living with her parents in Kansas, the latter providing well for them in an elegant home. The mother's conduct since the divorce had been irreproachable. The father was a travelling salesman, generally on the road, and having no home to offer the children, except under the care of his mother or hired servants. On the petition of the father for the possession of the children, *held*, that they should be committed to the custody of the maternal grandmother, upon security to keep them in the jurisdiction of the court and produce them when required, with leave to the father to visit them at her house, or take them away at any time for a day within the county, upon security to return them.*

PETITION for *habeas corpus*. The opinion states the case.

*See *McKim v. McKim* (12 R. 1 462), 24 Am. Rep. 694, and note, 698.

In the Matter of Bort

C. F. W. Dassler, for petitioner.

Lucien Baker, for defendant.

BREWER, J. This is a proceeding in *habeas corpus*, brought by Frank B. Bort, the father of Edith M. Bort and Fred. Bort, against Medora E. Bort, the mother, for possession of these children. At the time of the commencement of this proceeding the children lacked a few weeks of being, respectively, four and five years old. The parents were divorced by a decree of the Circuit Court of Sauk county, Wisconsin, on January 26, 1881. This decree awarded the custody of the children to the father, and upon this decree plaintiff mainly relies. The petition in said action was filed April 17, 1880, by Mrs. Bort. At that time both parties resided within the jurisdiction of said court. Defendant filed a cross-petition in that action. Soon after commencing her action, Mrs. Bort took her children and came to Leavenworth to live with her parents, where she has ever since resided. In October, 1880, she dismissed her suit in Sauk county, but the case went on to trial upon the cross-petition, and upon that a decree was entered in favor of defendant, giving him a divorce for the fault of plaintiff, and also the custody of the children.

The petitioner invokes the benefit of that clause of the Federal Constitution which provides that full faith and credit shall be given in each State to the judicial proceedings of every other State, and insists that that decree concludes the question as to the rights of the respective parents at its date, and that unless some subsequent change in the relative position and fitness of the respective parties is shown, the custody must be given to the father. This claim seems to rest on the assumption that the parents have some property rights in the possession of their children, and is very justly repudiated by the courts of Massachusetts. 2 Bish. on Mar. and Div., 5 ed., 204.

We do not however propose to place our disposition of this case upon the decision of any such question as that. We shall concede, that as between the parents, that decision is a finality, and still we do not feel warranted in sustaining the petition of the plaintiff.

We understand the law to be, when the custody of children is the question, that the best interests of the children is the paramount fact. Rights of father and mother sink into insignificance before that. Even when father and mother are living together, a court

In the Matter of Bort.

has the power, if the best interests of the child require it, to take it away from both parents and commit the custody to a third person. In other words, a Court of Chancery stands as a guardian of all children, and may interfere at any time and in any way to protect and advance their welfare and interests. Now in a divorce suit the court is limited to the question: Which of the two parents is the better custodian of the children? The decision only determines the rights of the parties *inter sese*. But in this proceeding the question is: What do the best interests of the children require? Shall they be given to either party? or shall the court place the custody with some other person? Now the petitioner and respondent, or plaintiff and defendant, in this proceeding, the parents of these children, late husband and wife, have filed in this court most bitter and malignant charges against each other. We have examined the testimony adduced in support of these charges, and are glad to know that neither is as bad as the other would have us believe. It is sad to see two, who but so recently were joined in the holiest of unions, and who pledged to each other a love and faith even unto death, now searching for epithet and charge to blacken each other's good name, and to pass down to their little ones an inheritance of dishonor. When the fury of present anger shall have spent its force, and calmer hours come, justice and generosity, we can but believe, will resume their sway, and bitterly will each regret the useless and untruthful charges against the other.

But the question for our decision is, what do the best interests of the children require? The petitioner is a travelling salesman, away from home a large part of his time. While away, the children would necessarily have to be under the care of his mother—a woman past middle age—or such hired help as he might secure. On the other hand, Mrs. Bort is now living with her parents, Mr. and Mrs. D. W. Powers, reputable citizens of Leavenworth. They have an elegant home a few miles from the city, and have expressed their desire to have the care and custody of their little grandchildren. Besides these, an unmarried sister and a brother of Mrs. Bort constitute the household. All seem to have the warmest affection for these children. We see no reason to doubt that Mrs. Bort is a loving mother, devoted and faithful to her little ones. Her conduct since she left her husband, and since the divorce, seems to have been without reproach. Whatever may be her faults, it is evident that these children will receive only the kindest care if left

In the Matter of Bort.

in their present home. They are of that tender age when they need a mother's care. No stranger, however kind, can fill her place. We may not ignore these universal laws of our nature, and they compel us to place these children where they will be within the reach of a mother's love and care. At the same time, it would be unjust to have the minds of those children poisoned against their father. He is industrious, energetic, a good salesman, travelling for a reputable house in Chicago, a house which appreciates and has confidence in him. He has a father's love for these little ones, and desires their best welfare. He would not have them alienated from him, and they ought not to be. Without discussing the situation further, the order which will be made is as follows:

The children will be committed to the care and custody of Mrs. Powers, their grandmother, upon her giving a bond to the State of Kansas in the sum of three thousand dollars, with two sufficient sureties, to be approved by the clerk of this court, conditioned that she will keep the children within the jurisdiction of this court, and will produce them in court whenever so required.

Whenever the father desires he shall, upon giving twenty-four hours' notice to Mrs. Powers, be permitted to visit his children at the house of Mrs. Powers, going there alone to be with them there alone; he must be received without insult or injury; he will also be permitted to have the company of his children away from the house of Mrs. Powers at any place within the county of Leavenworth he may desire, to take them out riding or driving within the limits of such county, providing he first give bond to the State of Kansas in the sum of five thousand dollars, with two sufficient sureties, to be approved by the clerk of this court, conditioned that he will not take or permit them to be taken outside the county of Leavenworth, and that he will return them to the house of Mrs. Powers during the day-time of the same day upon which they were taken therefrom.

Each party must pay the cost of his or her own depositions. The other cost will be taxed against the petitioner. The case will be continued in this court for such further orders and disposition as the best interests of the children shall require.

All the justices concurring.

Neil v. Case.

NEIL V. CASE.

(36 Kans. 510.)

Evidence — alteration of written instrument — question as to when made.

A negotiable note offered in evidence, bearing on its face an apparent material alteration, is admissible, and the question as to the time of alteration is for the jury. (*See note, p. 260.*)

ACTION on a promissory note. The opinion states the point. The plaintiff had judgment below.

L. J. Craus, for plaintiff in error.

Guthrie & Brown, Palmer & Knappenberger, and *Edwin A. Austin* for defendants in error.

HORTON, C. J. [Omitting a minor question.] When the written instrument was presented in evidence it appeared from the face thereof that the rate of interest had been changed either from seven to ten or from ten to seven per cent, and the administratrix objected to the reception of the writing in evidence until such apparent alteration had been explained. The court overruled the objection, and held that the burden of proof was upon the defendant to show that the alteration was made after its execution. Counsel challenge this rule, and insist that the weight of authority is: If on the production of a written instrument it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance. This is a vexed question, and the books are full of diverse decisions. Four different rules are generally stated: First. That an alteration apparent on the face of the writing raises no presumption either way, but the question is for the jury; second, that it raises a presumption against the writing, and requires therefore some explanation to render it admissible; third, that it raises such a presumption when it is suspicious, otherwise not; fourth, that it is presumed, in the absence of explanation, to have been made before delivery, and therefore requires no explanation in the first instance.

It is impossible to fix a cast-iron rule to control in all cases: but certainly the second rule, and the one contended for by plaintiff in

error, is not the true one. Clearly, in ordinary cases the alteration ought not to raise a presumption against the instrument, because the law never presumes wrong. The question as to time of the alteration is, in the last instance, one for the jury. It is, like any other fact in the case, to be settled by the trier or triers of the facts. Generally, the instrument should be given in evidence, and in a jury case should go to the jury, upon ordinary proof of its execution, leaving the parties to such explanatory evidence of the alteration as they may choose to offer. If there is neither intrinsic nor extrinsic evidence as to when the alteration was made, it is to be presumed, if any presumption is said to exist, that the alteration was made before, or at the time of the execution of the instrument. Perhaps there might be cases when the alteration is attended with such manifest circumstances of suspicion that the court might refuse to allow the instrument to go before the jury until some explanation; but this case is not of that character. *First Nat. Bank v. Franklin*, 20 Kans. 264; *Stoner v. Ellis*, 6 Ind. 161; *Paramore v. Linsey*, 63 Mo. 63; *White v. Hass*, 32 Ala. 430. See, also, *Hunt v. Gray*, 35 N. J. 227; s. c., 10 Am. Rep. 232; *Hayden v. Goodnow*, 39 Conn. 164; *Davis v. Jenney*, 1 Metc. 221.

Many of the authorities conflicting with these views, upon examination will be found to have been based upon principles applicable to the alteration of written deeds only, and seem to have been founded upon the solemn character of sealed instruments as evidence. As the deed was the only evidence of a contract under seal, and could not be contradicted, it was highly important that it should declare the true intent of the parties, and that it should speak an unvarying and unequivocal language; therefore it was deemed necessary to protect it from every possibility of alteration, hence the reason of many of the decisions holding every alteration as raising a presumption against the instrument. *Pigot's case*, 11 Co. 27.

[But on another point]

The judgment of the District Court must be reversed, and the case remanded.

Reversed and remanded.

All the justices concurring.

NOTE BY THE REPORTER.—Wharton says (1 Ev., § 689): "If there is nothing suspicious on the face of the instrument, but the alteration is one which appears to accord with the object of the instrument, then we should say that the burden of proving bad faith in this respect is on the party asserting bad faith." "Where in a contract *inter vivos* alterations

Neil v. Case.

interlineations appear, about which alterations or interlineations there is nothing suspicious, the presumption is that they were made before the execution of the instrument, and hence the burden of proving that they were made after the execution of the instrument falls on the party assailing it. The question of spoliation then goes to the jury as a question of fact. As to negotiable paper, it has been said that the law makes no presumption, but leaves the question of prejudicial alteration to be determined by the jury on all the evidence of the case, though when such alteration is apparent, and is favorable to the party offering the note, then he must bear the burden of explanation."

Greenleaf says (1 Ev., § 564): "If, on the production of the instrument, it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance. Every alteration on the face of a written instrument detracts from its credit, and renders it suspicious; and this suspicion the party claiming under it is ordinarily held bound to remove."

"Generally speaking, if nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument. But if any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom and the intent with which the alteration was made, as matters of fact, to be ultimately found by the jury upon proofs to be adduced by the party offering the instrument in evidence."

As to negotiable instruments, Daniels states the rule (2 Neg. Inst., §§ 1417, 1418): "Where an alteration is apparent upon the face of the instrument," the holder ought to explain why he took it branded with marks of suspicion, and "the very fact that he received it is presumptive evidence that it was unaltered at the time." "A different principle applies to deeds and other written contracts; and the exception is made in respect to negotiable paper, because being intended for circulation, the greater strictness and watchfulness is necessary." This exception is recognized by Greenleaf (1 Ev., § 564, note), citing a large number of cases.

In *Gooch v. Bryant*, 1 Shepley, 386, it was held that an apparent alteration of a figure in the date of a note is not evidence that the alteration was made after execution and delivery, but it is a question for the jury. The court said the contrary doctrine "would be to establish guilt by a rule of law, where there would be at least an equal probability of innocence." This is followed, *Crabtree v. Clark*, 7 Shepley, 337, and is supported by *Rankin v. Blackwell*, 2 Johns. Cas. 198 (date and amount altered); *President, etc., v. Hall*, 6 N. J. 315 (name of one of two payees erased); *Sayre v. Reynolds*, 5 Id. 737 (date altered); *Bodley v. Taylor*, 11 Conn. 531 (amount reduced); *Admr's of Beaman v. Russell*, 20 Vt. 205 (date altered); *Cochran v. Nebeker*, 48 Ind. 459 (condition detached); *Farnsworth v. Sharp*, 4 Sneed, 55 (scroll erased); *Gillett v. Sweat*, 6 Ill. 475 (name of one maker cut off); *Davis v. Jenny*, 1 Metc. 231 (SHAW, C. J., obiter). The question is learnedly examined in *Admr's of Beaman v. Russell*, 20 Vt. 205, and the court say: "Amidst the conflict of authorities in this country, and with the little aid that can be derived from the modern English cases, I should be disposed to fall back upon the ancient common-law rule, that an alteration of a written instrument, if nothing appear to the contrary, should be presumed to have been made at the time of the execution. I think this rule is demanded by the actual condition of the business transactions of this country, and especially of this State, where a great portion of the contracts made are drawn by the parties to them, and without due care in regard to interlineations and alterations. To establish an invariable rule, such as is claimed in behalf of the defendant, that the party producing the paper should in all cases be bound to explain any alteration by extrinsic evidence, would, I apprehend, do injustice in a great majority of the instances in which it should be applied. Such a rule might be tolerated — might, perhaps, be beneficially adopted — in a highly commercial country like that of Great Britain, in regard to negotiable paper, which is generally written by men trained to clerical accuracy, and is upon stamped paper, the very cost of which would induce special care in the drawing of it; but I am persuaded its application here could not be otherwise than injurious. It is not often that an alteration can be accounted for by extraneous evidence; and to hold that in all cases such evidence must be given, without regard to any suspicious appearance of the alteration, would in many instances be doing such manifest injustice as to shock the common sense of most men."

Neil v. Case.

In *Huntington v. Finch*, 3 Ohio St. 445, it is held that the erasure of the name of a surety on a note will be presumed to have been made before delivery, or afterward by agreement. "The rule established by the greater weight of authority, both in England and in this country, appears to be that where the alteration is suspicious and beneficial to the holder of the paper, the party seeking to enforce it is required to explain it before he can recover; but where the alteration is not particularly suspicious and beneficial to the holder, the alteration will be presumed to have been made either before the execution of the paper or by the consent of the parties."

In *Taylor v. Moseley*, 6 C. & P. 273, where the amount was altered and a place of payment was inserted, it was held a question for the jury, but "it certainly lay on the plaintiff to account for the suspicious form and obvious alteration of the note. They were to judge from inspection of the note." The same doctrine in *Whitfield v. Collingwood*, 2 C. & K. 325, where the date was altered. So where "without defalcation or set-off" was added, *Davis v. Carlisle*, 6 Ala. (N. S.) 707. So where the payee's name being "B. C.," was by mistake written "B. R. C.," and the "C.," was erased, *Cole v. Hills*, 44 N. H. 227. But the court recognized the doctrine of *Hill v. Barnes*, 11 N. H. 395 (where the date was changed), that "we hold the presumption to be that an alteration, if unexplained by evidence, or by circumstances, or the appearance of the paper itself, was made after the execution and delivery of the instrument," adding, "yet the whole question is for the jury; not only the fact as to whether there has been any alteration at all, where there is doubt upon that point, but also the time when the alteration was made." So in *Hunt v. Gray*, 35 N. J. 227; s. c., 10 Am. Rep. 232, where the words "or discount" were added to "without defalcation." So in *Paramore v. Lindsey*, 63 Mo. 63, where the words "after maturity," in the interest clause, were erased. The court said, referring to *Matthew v. Coater*, 9 Mo. 696: "In the opinion it was said, that the law presumes honesty of purpose and of action, until the contrary is shown. The ancient rule of evidence was therefore to presume alterations and erasures of written instruments to have been made at the time of, or anterior to, their execution; and the weight of authority was decidedly in favor of the ancient rule. Where an alteration or erasure appears suspicious on its face, as if the ink differ, or the handwriting be that of the holder interested in the alteration, it must be explained. If nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument. But if any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing; but leaves the question of the time when it was done, as well as the person by whom, and the interest with which, the alteration was made, as matters of fact, to be ultimately found by the jury, upon proofs to be adduced by the party offering the instrument in evidence. 1 Greenl. Ev., § 564. The appearance of any thing suspicious on the face of the instrument is a preliminary matter, to be determined on an inspection by the court. The court looked at the writing and found nothing suspicious in the character of the alteration or erasure; and under these circumstances the instruction that it gave was in conformity with the long-established law of this State." So in *Hayden v. Goodnow*, 39 Conn. 164, where the indorsee erased the previous indorsements, the court held the question one of fact, following *Bailey v. Taylor*, 11 Conn. 541, and said: "The burden of proof of accounting for an erasure or alteration is not necessarily on the party producing the instrument."

But the contrary is held in *Hills v. Barnes*, 11 N. H. 395, a case of alteration of date as to a case of absence of any evidence, either on the face or outside the note, but holding that the evidence is for the jury; citing *Gooch v. Bryant*, 1 Shep. 390. This was a case of alteration of date. The same, *Heffner v. Wenrich*, 32 Penn. St. 428; *Kennedy v. Bank*, 14 id. 347; *Low v. Merrill*, 1 Pinn. 240. In the last case it is said: "If a note has been altered in a material part, it is inadmissible in evidence for any available purpose whatever, until the alteration is satisfactorily explained." The same doctrine in *Knight v. Clements*, 8 Ad. & Ell. 215; *Clifford v. Parker*, 2 M. & G. 909; *Bishop v. Chambre*, 3 C. & P. 53. These were all cases of altered dates. So where the amount was increased, *Herman v. Dickinson*, 5 Bing. 188; *Wheat v. Arnold*, 36 Ga. 480; *Warren v. Layton*, 4 Harring. 404. So where the amount was decreased, *Chism v. Toomer*, 27 Ark. 109. So where "second of exchange" was altered to "only of exchange," *White v. Hass*, 33 Ala. 430. So where the

Neil v. Case.

place of payment was erased, *Fontaine v. Gunter*, 31 Ala. 258; or added, *Simpson v. Slackhouse*, 9 Barr. 185. So where the name of a promisor was erased, *Daniel v. Daniel*, Dal. 229; or torn off, *Elbert v. McClland*, 8 Bush, 577. So where "if the same be a Men on the land bought," was interlined, *McMicken v. Beauchamp*, 2 La. 290. So where "after due" was erased, *Willett v. Shepard*, 32 Mich. 106. So where "& Co." was added, *Wild v. Armaby*, 6 Cush. 314. So where the time of payment was changed, *Runnton v. Cruse*, 4 Blackf. 466. So where "I" was changed to "we," *Humphreys v. Gullow*, 13 N. H. 385.

In *Prevost v. Gratz*, 1 Pet. Circ. 364, it was held, that an apparent erasure in a deed or settled account is presumed to have been made after execution and delivery. (But this was reversed, 6 Wheat. 502.) The same in *Morris v. Vanderlin*, 1 Dall. 65; *Jackson v. Osborne*, 2 Wend. 555; grantee's name on an erasure (but this holds it a question of fact); *Herrick v. Malin*, 22 id. 388 (obiter); *Barrington v. Bank of Washington*, 14 S. & R. 405 (erasure of name of one of several obligors); *Acker v. Ledyard*, 8 Barb. 514 ("in advance" erased from condition for payment of rent in a lease); *Jordan v. Stewart*, 23 Penn. St. 244 ("or any other person whatsoever" inserted in a warranty in a deed, "the law presumes nothing, but leaves the question as to the time when it was done to be ultimately found by the jury, upon proofs to be adduced by him who offers it in evidence"); *Piercey v. Piercey*, 5 W. Va. 199 (a seal torn off a bond); *Newcomb v. Presbrey*, 8 Metc. 406 (signature of grantor erased); *Porter v. Doby*, 2 Rich. Eq. 49 (sealed note with seal cut out); *Walters v. Short*, 10 Ill. 252 ("thirty dollars worth of salable cattle shall be delivered above the fifty [\$50] worth," interlined in an agreement for fifty dollars worth of good cattle).

On the other hand, in *Wickes v. Caulk*, 5 Harr. & J. 56, it was held that in case of an erasure of the names of attesting witnesses in a deed, "it is not incumbent on the party who wishes to avoid the deed by its erasure, to prove that the alteration was made after its execution and delivery." But this was on the ground that "attesting witnesses are not necessary to the validity of a deed." The same doctrine, *Van Horne v. Dorrance*, 2 Dall. 306 (description of premises written on an erasure); *Boothby v. Stanley*, 34 Me. 515 (in a return to an execution, "two public places in said town of Leeds" changed to "the said town of Leeds"); *Smith v. McGowan*, 3 Barb. 404 (grantor's name written over an erasure); *Matthews v. Coaller*, 9 Mo. 705 (insertion of "square" before "miles" in an agreement); *Horry Dist. v. Harrison*, 1 N. & McC. 554 (interlineation in bond); *Hoffelfinger v. Shutz*, 16 S. & R. 44 (insertion in deed of exception diminishing the interest conveyed); *Doe v. Catomore*, 16 Ad. & Ell. (U. S.) 745 (immaterial alterations in deed). Here Lord CAMPBELL said: "A deed cannot be altered after it is executed, without fraud or wrong; and the presumption is against fraud or wrong. A testator may alter his will without fraud or wrong after it has been executed, and there is no ground for any presumption that the alteration was made before the will was executed." So in *Puller v. Snow*, 3 Dev. 228, where a date was altered so that it would deprive the grantee of a year's interest. So in *Stoner v. Ellis*, 6 Ind. 152, where a deed of a patent was altered by striking out the names of certain of the counties in which the right to sell was granted. In this case the court said: "The alteration of a paper is a question of fact for a jury to try, and we know of no rule, founded in reason, which makes the eyes of the court any better than those of the jury upon an inspection of the instrument. The appearance of the alteration, when compared with other parts of the instrument, may of itself be sufficient to condemn it, and the motive for the change may be deduced from its nature, and the effect upon the party, as being for or against his interest. The motive in some cases may be apparent, but in others it may not. In general, it would scarcely be supposed that a party having custody of a deed would choose to injure his own title by tampering with it; but he might have such inducement." "We are of the opinion that where the alteration is of such a character as to defeat entirely the operation of the instrument, for any purpose, as in the case of the erasure of the signature and seal to a deed or other instrument, so that admitting all to be true that appears upon the instrument when produced, it will be void in law, it should be explained, in the first instance, before it should be permitted to go to the jury. In other cases, the instrument should be permitted to be given in evidence, and should go to the jury upon the ordinary proof of its execution, although an alteration may appear in it, leaving the parties to such explanatory evidence as they may choose to offer. But

If there is neither intrinsic nor extrinsic evidence as to when the alteration was made, the presumption of law is that it was made before or at the execution of the instrument." So in *Little v. Herndon*, 10 Wall. 31, the case of an erasure in a patent. So in *Sirrine v. Briggs*, 31 Mich. 445, the case of an unsuspecting alteration of a chattel mortgage. So in *Munroe v. Eastman*, id. 283, where the number of a section in the description in a deed was written over an erasure. So in *Ramsey's Administrators v. McCue*, 21 Gratt. 39, where a date in a recital in a bond had been altered, the court held the question one of fact, whether the alteration was material or not. The same doctrine in *McCormick v. Fitzmorris*, 39 Mo. 24, where, in a deed, the description of a note, to secure which it was given, was changed from "ten" to "two." So in *Muliken v. Martin*, 66 Ill. 13, where part of a deed was in a different hand and ink from the rest. So in *National Bank v. Franklin*, 20 Kans. 284, where in an order of sale directed to "C. B., deputy sheriff," the first three words had been erased. The court held this immaterial, and observed, citing the rule as laid down by Greenleaf: "And the rule is a reasonable one. Nearly every one can write, and written instruments are as abundant as the leaves of the forests. They are prepared by all sorts of persons — those skilled in the law, and those not — and cover all sorts of transactions. Pending negotiations, the original draft is subject to constant changes, and is as often signed with all the changes, erasures and interlineations, as it is copied for execution. The hurry of business will not wait for perfect copies without erasures or interlineations. The law must take things as it finds them, and adjust its rules to the facts of every-day life. To require in every case of change, proof that the change was made before execution, before the instrument is admissible in evidence, would tend to prevent rather than accomplish justice. It will be borne in mind that the more important the transaction, the more likelihood of parties waiting for a perfect copy, and of remembering the circumstances, or noting the fact of any alteration, while the less important the transaction the less likelihood of waiting, or noting, or of remembering. Hence, evidence would be more accessible in the former than in the latter case, and at the same time less likely to be needed. So that the presumption, in the absence of suspicious circumstances, that the change was innocent, and made before execution, runs parallel with the actual experiences of business, and tends to uphold those transactions which stand in most need of such help."

In *Cox v. Palmer*, U. S. Circuit Court, Minnesota, June, 1880, McCrary, J., held, that in deciding as to whether an interlineation in an instrument is an unauthorized alteration or not, the rule is that if the interlineation is in itself suspicious, as if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words; or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink — in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution. On the other hand, if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith, and before execution. *Stoner v. Ellis*, 6 Ind. 152; *Huntington v. Finch*, 3 Ohio St. 445; *Nichols v. Johnson*, 10 Conn. 192; *Burnham v. Ayer*, 35 N. H. 351; *Beaman v. Russell*, 20 Vt. 205.

Where the alteration is not apparent, the burden is on the party alleging it to show it. *Pullen v. Hutchinson*, 12 Shepl. 254; *Mucklerny v. Bethany*, 27 Tex. 551; *Brown v. Phelan*, 3 Swan, 629; *Meeks v. St. Sav. Inst.*, 56 Ind. 355.

City of Emporia v. Soden.

CITY OF EMPORIA V. SODEN.

(25 Kans. 588.)

Municipal corporation — right to draw water from private dam.

The plaintiff had erected and for nineteen years maintained and operated expensive mills on the bank of a river, the power being furnished by a dam at the same time built across the river by him. The supply of water was at some seasons insufficient to drive the mills. The defendant city then erected water-works for its municipal purposes, and supplied them from this pond, by direct draught through pipes and by percolation into adjacent wells without condemnation or compensation. *Held*, that the city should be enjoined. (See note, p. 274.)

INJUNCTION. The opinion states the case. The plaintiff had judgment below.

I. E. Lambert, Ross Burns, A. A. Hurd and W. C. Campbell, for plaintiffs in error.

Scott & Lynn and Almerin Gillett, for defendant in error.

BREWER, J. This case presents some questions which are new in the history of this State, and upon which, indeed, few authorities can be found anywhere. The facts are these: Soden is the owner of some mills, built on his own land, on the banks of the Cottonwood river. These mills are propelled exclusively by water power. To secure this power Soden erected and maintains a dam, which raises the water some seven or eight feet, and makes above the dam quite a pond. The mills are of great value, having cost many thousands of dollars. Soden's title to this water power is clear and full. He has used and maintained it for nineteen years. He owns the land upon which the dam is built, and purchased and obtained a conveyance from the upper riparian owner of the right of flowage. This conveyance was excuted and recorded in 1860. In 1880, the city of Emporia, a prosperous city of 5,000 inhabitants, constructed a system of water-works for the purpose of supplying its citizens with water, and purchased a tract of land adjoining and above the mill property and extending to the center of the river. On this land, and from seventy-five to a hundred feet from the bank of the river, it dug a well twenty-five feet in diameter and twenty-six

feet in depth. The court found that this well drew its supply of water from the plaintiff's mill pond. Into the well it sank one pipe, and another it ran into the mill pond. The latter however it intended to use only in case of fire, depending on the former for the ordinary supply of the city. Soden duly warned the city not to attempt, directly or indirectly to take water from his mill pond. No condemnation of the water, and no arrangement with Soden, were ever made. Whereupon Soden brought this action, and obtained an injunction in the District Court restraining the city from taking water from the pond or well. To reverse such judgment, this proceeding in error has been brought.

[Omitting minor questions.]

For the present, and to determine the legal rights of the parties, we shall assume that in case of fire the water will be taken directly from the mill pond by means of the pipe running into it, and that generally the supply of water in the pond will be reduced by means of the indirect abstraction through the well, and the subsequent transmissions through the streets of Emporia for the accommodation of its citizens. Has the plaintiff any remedy for this direct and indirect abstraction of water, and consequent diminution in amount of power? The amount of water now used by the city and its present effect upon the plaintiff's business do not determine the question of right or remedy. The continuance of the water-works, as well as the growth of the city, will increase the demand; and if the present abstraction can be sustained, there is no legal principle upon which the future and larger abstraction can be restrained. Now, that the flow of water in the natural channel of a surface stream is a property right of the riparian owner, is unquestioned and familiar law. *Shamleffer v. Mill Co.*, 18 Kans. 24. If any individual should, by digging a new channel a few hundred feet above Soden's dam, attempt to divert the flow of the stream, beyond doubt he would be restrained. And this restraint would be granted, not because of the mere fact of digging a channel, but because thereby the natural flow of the stream was prevented; not because of the manner, but because of the fact of the diversion. The restraint would be granted as readily if the abstraction was by pipes and pumps, as if by channel and a change of current. The principle is this: That whatever of benefit, whether of power or otherwise, comes from the flow of water in the channel of a natural stream, is a matter of property and belongs to the riparian owner, and is protected

City of Emporia v. Soden.

in law just as fully as the land which he owns. It cannot be taken for private use except by his consent, and for public use only upon due compensation.

With these general and conceded principles, let us now inquire as to the validity of the grounds upon which the action of the city is sought to be justified. The fact is obvious, that by means of the pipe running into the pond, there will be in case of fire a direct abstraction of water, and the fact is found that by means of the well there is an indirect abstraction. The flow of water is as heretofore stated thus interfered with and the power diminished. It is in evidence that while at certain seasons of the year the water supply is more than enough for all of plaintiff's present uses, and that during such seasons the consumption of water in the city would work no present injury, yet at other seasons the supply is insufficient, and some or all of his mills are compelled to stop running. Hence naturally any abstraction of the water would tend to increase the time during which his mills must be idle, and therefore work present and positive injury — an injury increasing with the increasing consumption by the city. Further, if plaintiff is entitled to this water power at all, he is entitled to all of it, and may increase the number of mills, or amount of machinery propelled by it, until his uses shall wholly exhaust it. So that matters of amount really fade out of sight, and the question is one of right and title.

The city defends its action upon three grounds. First, as to the pipe running into the pond and the water thus taken therefrom, that such use is intended in cases of fire only, and that then "*salus populi suprema lex*" controls. As in case of fire, the general safety justifies the destruction of one building, to prevent the spread of fire and the ruin of all, so such emergency will justify the appropriation of even the entire flow of any river. We do not doubt that emergencies may arise which justify the most extreme measures, and that in such emergencies the individual must suffer for the needs and protection of the public. But it is not every fire that creates such an emergency. An isolated building on fire endangers little or nothing. Yet to save somebody's barn, whose burning endangers no other building, the city proposes to take from plaintiff some portion of the power necessary for the running of his mills. Is this not very like robbing Peter to pay Paul? May the city take one man's property to prevent another man's loss? Doubtless the public owes to the individual the duty of reasonable

effort to prevent destruction by fire, but such duty does not compel premeditated and uncompensated appropriation of private property. The public may justify the destruction of one building by powder, to save many buildings from destruction by fire ; but the possibility of such an emergency will not authorize the public to take possession of every individual's cellar and turn it into a powder magazine, so as to be ready for the emergency.

A second matter of defense is this : While the undiminished flow of the stream is conceded to be the right of every riparian owner, yet this right has always been limited to this extent, that each riparian owner may, without subjecting himself to liability to any lower riparian owner, use of the water whatever is needed for his own domestic purposes and the watering of his stock. The city is a riparian owner, and whether it uses little or much, it is simply taking for domestic purposes. Each individual citizen of Emporia may buy land on the banks of the river and then take for domestic uses whatever amount of water he needs. What the individual separately may do, the city representing all the individuals, has done. Does the manner in which the result was accomplished make any difference to the right ?

This argument is plausible, but not sound. A city cannot be considered a riparian owner within the scope of the exception named. The amount of water which an individual living on the banks of a stream will use for domestic purposes, is comparatively trifling. Such use may be tolerated upon the principle *de minimis non curat lex*. It is a use which must always be anticipated, and may reasonably be considered as one of the benefits of the ownership of the banks of a natural stream. Every one proposing to utilize the power of running water should reasonably expect that the stream is chargeable with such a slight burden. It is only a fair equalization of rights. But the taking of water for the supply of a populous and growing city, stands upon an entirely different basis. No man can foresee this; and if it were tolerated, no one would dare to expend money in utilizing this power for fear of its being soon taken from him without compensation, and with total loss to his investment. The city, as a corporation, may own land on the banks, and thus in one sense be a riparian owner. But this does not make each citizen a riparian owner. And the corporation is not taking the water for its own domestic purposes ; it is not an individual ; it has no natural wants ; it is not taken for its own

City of Emporia v. Soden.

use, but to supply a multitude of individuals; it takes to sell. Again, the statute under which the city is acting (Comp. Laws 1879, p. 997, § 1), authorizes the taking of water "for the purpose of supplying the inhabitants of such cities with water for domestic use, the extinguishment of fires, and for manufacturing and other purposes." It would be strange if the city could destroy plaintiff's water power without compensation, and then sell it to other manufacturers, and thus build up rival establishments. This same question was before the Supreme Court of Alabama, and in a well-considered case the same conclusion was reached. We quote from the opinion in that case :

"It is insisted however that the fact that the city of Mobile owned land on the creek, upon the point where the mill of the defendant in error was located, gave to that corporation the right to the use of the water in sufficient quantities to supply the domestic purposes of its inhabitants. That a riparian proprietor has the right to consume even the whole of the water of a stream, if absolutely necessary for the wants of himself and family, has received the sanction of judicial decision. *Evans v. Merriweather*, 3 Scam. 496; *Arnold v. Foot*, 12 Wend. 330. But if this doctrine be correct, it can have no application in the present instance, because it rests upon reasons which are wholly inapplicable to corporations, which are artificial bodies, and can have no natural wants. There are however other considerations which would forbid the extension of this rule to the case before us. The city of Mobile is not located upon the creek; it is from three to five miles distant. To hold that a municipal corporation can, from the mere fact of owning land upon a water-course, acquire the right to divert the water in sufficient quantities to supply the domestic wants of its inhabitants, residing at a distance of from three to five miles, to the injury of other proprietors, would be unreasonable in itself and unjust to those who have an equal right to participate in the benefits of the stream." *Stein v. Burden*, 24 Ala. 130. See also *Garwood v. N. Y. C. & H. R. R. Co.*, 83 N. Y. 400; s. c., 23 Alb. L. J. 215.

A final matter, applicable solely to the well, and the most serious and difficult question in the case, is, that as the water enters only by percolation through the soil, the law will permit no inquiry into the sources of supply, or the effect of such percolation upon the quantity of water in any other tract of land. It is doubtless true,

as a general proposition, that the law takes no cognizance of percolating water.* The impossibility of proving with reasonable certainty the sources of supply, is a strong if not the principal reason therefor. But upon whatever founded, the doctrine may be considered settled. Chief Justice CHAPMAN, in delivering the opinion of the court in the case of *Wilson v. New Bedford*, 108 Mass. 265; s. c., 11 Am. Rep. 352, says: "The percolating water belongs to the owner of the land as much as the land itself, or the rocks and stones in it; therefore he may dig a well, and make it very large, and draw up the water by machinery or otherwise, in such quantities as to supply aqueducts for a large neighborhood. He may thus take the water which would otherwise pass by natural percolation into his neighbor's land, and draw off the water which may come by natural percolation from his neighbor's land." See also the following cases: *Acton v. Blundell*, 12 M. & W. 352; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Wheatley v. Baugh*, 25 Penn. St. 528; *Ellis v. Duncan*, 21 Barb. 230; *Greenleaf v. Francis*, 18 Pick. 117; *Brown v. Illius*, 27 Conn. 84; *Chase v. Silverstone*, 62 Me. 175; s. c., 16 Am. Rep. 419; *Chatfield v. Wilson*, 28 Vt. 49; *Frazier v. Brown*, 12 Ohio St. 294; *Roath v. Driscoll*, 20 Conn. 533. Does this case furnish an exception to or limitation upon this doctrine?

It is also a general proposition, that a man may not do indirectly what he may not do directly. Unquestionably, a party may not run pipes into plaintiff's mill-pond, or dig a channel to it and thus divert the water. May he accomplish the same result by digging a well upon the very banks, and so near thereto that the water oozes out from the pond into the well, and be beyond the reach of the law so long as he keeps a wall of earth between the well and the pond? If this were recognized as law, protection to the owners of water power would rest on slender foundations. Often the banks of a stream are composed of very porous soil; or it may be there is, as in this case, a bed of gravel through which the water runs as through a sieve. Is the owner of the pond, then, at the mercy of any one who, avoiding the more direct and public method of pipe or channel, resorts to the equally effective means of adjacent wells? And if a well on the very bank would be restrained, may the same result be accomplished by digging one a few feet off? It would seem as though but one answer could in justice be given—

* See *Phelps v. Nowlen*, 72 N Y. 39; s. c., 23 Am. Rep. 98, and note, 101.—*REP.*

City of Emporia v. Soden.

that the owner of an established power is entitled to protection against any subtraction therefrom, whether sought to be accomplished by direct or indirect methods. We are aware that the further the well is removed from the bank of the stream, the more difficult and uncertain the evidence of the abstraction of the water; but when the fact of the abstraction is proved, it would seem that relief must necessarily follow. It is a matter of common knowledge that water, passing through but a narrow passage and finding at the end an outlet, soon increases by its flow the size of the passage; and thus, that which at first was but a mere trickle, becomes in time a sizable stream, and the abstraction which at first was limited, soon increases, until it may eventuate in a general exhaustion. Of course, the mere proximity of the well to the stream does not prove the abstraction — there may be other and subterranean sources of supply, and he who alleges the abstraction has the burden of proof; and if he fails to establish the fact, he fails to show a right to relief, and if he asks compensation for the abstraction, he can recover only for the amount which he is able to prove. Here the fact is found, and upon that finding plaintiff is entitled to relief.

Authorities, as was stated in the outset of this opinion, are few; but those most directly in point sustain the views we have expressed. The case of *Dickinson v. Canal Co.*, 7 Exch. 280, was decided in 1852. In this case it appeared that defendant had dug a well, out of which it pumped water to supply its canal. The effect of this was to intercept water which theretofore percolated through the ground into the river Bulborne, and also to abstract from said river a portion of the water which had already entered into and become a part of the stream. The plaintiffs, the owners of certain mills propelled by the water power of said river, brought their action, and it was held maintainable on both grounds. In 1859, the case of *Chasemore v. Richards* was decided in the House of Lords. 7 H. of L. Cas. 348. This case overrules *Dickinson v. Canal Co.*, so far as respects the interception of water percolating toward and into the stream, but leaves unquestioned the other ground, that of the abstraction of water from a natural stream. The facts were these: Plaintiff was the owner of a mill propelled by the water power of the river Wandle. The defendant, for the purpose of supplying the town of Croydon with water, dug a large well on ground belonging to the town, and about a quarter of a mile from the river. Out of this from 500,000 to 600,000 gallons were daily pumped.

The effect of this was to intercept underground water in the vicinity of the well, which theretofore had percolated through the soil toward and into the river Wandle, and thus diminished the supply of water and amount of power in the river. It was held that the action could not be maintained. The opinions announced in that case (and five are reported) are interesting and instructive. All concurred in the judgment, though Lord WENSLEYDALE evidently did so with reluctance. All rest upon the general thought that there is so much uncertainty as to the direction and flow of underground water which has not assumed the form of a distinct, definite subterranean stream, that to attempt to apply the settled law as to surface streams would cause great confusion, and tend to prevent drainage and improvement of lands. There is in some of the opinions a distinct concession that no natural, definite stream, surface or subterranean, can be interfered with. The chancellor, Lord CHELMSFORD, says: "I agree with the observation of Lord Chancellor Baron POLLOCK, in *Dickinson v. Grand Junction Canal Co.*, 'that if the course of a subterranean stream were well known, as is the case with many which sink underground, pursue for a short space a subterraneous course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover had the stream been wholly above ground.'" And certainly nowhere in the case is any attempt made to deny protection to any established and definite natural stream against the abstraction, direct, or indirect, of its waters. In the subsequent case of *Grand Junction Canal Co. v. Shegar*, reported in 6 Ch. Ap. Cases, 487, it appeared that a local board of health had by its drains drawn off a subterranean spring, and also water from a running stream. In sustaining an injunction, Lord HATHERLY said: "I do not think *Chasemore v. Richards* has decided more than this, that you have a right to all the water which you can draw from the different sources which may percolate underground; but that has no bearing at all on what you may do with regard to water which is in a defined channel, and which you are not to touch. If you cannot get at the underground water without touching the water in a defined surface channel, I think you cannot get at it at all. You are not, by your operations, or by any act of yours, to diminish the water which runs in the defined channel, because that is not only

City of Emporia v. Soden.

for yourself, but for your neighbors also, who can have a clear right to use it and have it come to them unimpaired in quality and undiminished in quantity."

The three cases of *Bailey v. Woburn*, 126 Mass. 416; *Ætna Mills v. Waltham*, id. 422, and *Ætna Mills v. Brookline*, 127 id. 69, are instructive. In each of these cases the town had constructed a water gallery near the banks of the river. In the first case it appeared that connection between the gallery and the river was made by pipes and conduits; in the second, the water passed into the gallery through an artificial embankment, while in the third, it simply passed in by percolation through the natural soil. In each case this was adjudged a taking of the water of the river, for which damages could be recovered under the statute. In the last case the court notices the distinction between appropriating by well or otherwise that which is merely underground and percolating water, and diverting from a natural stream by means of an adjacent well, and clearly intimates that the last cannot be permitted.

In the case of *Village of Delhi v. Youmans*, 45 N. Y. 362; s. c., 6 Am. Rep. 100, the defendant dug a well on his own land, whereby water was drawn away from plaintiff's land. PECKHAM, J., for the court says: "If the action of the defendant took the water away from the springs after it had reached there, after it had become part of an open running stream, then this action would lie."

In *Pixley v. Clark*, 35 N. Y. 520, a different question was presented, but one which shows that the percolation of water may be the subject of judicial inquiry, notwithstanding the difficulties in the matter of proof. In that case the defendant built a dam across a stream, which raised the water so that it percolated through the natural bank and saturated an adjacent field, and it was held that he was liable for the damages. See also *Rawstron v. Taylor*, 33 Eng. L. & Eq. 428; *Broadbent v. Ramsbotham*, 34 id. 553; Goddard on Easem. 248; Washb. on Easem, 449; *Dexter v. Providence Aqueduct Co.*, 1 Story, 387; *Col. Silver Mining Co. v. Virginia & Gold Hill Water Co.*, 1 Sawy. 470; *Bassett v. Salisbury Manfg. Co.*, 43 N. H. 569; *Wheatley v. Baugh*, 25 Penn. St. 528; *Whetstone v. Bowser*, 29 id. 59.

Our conclusion then is, that the judgment of the District Court was correct, and must be sustained. Before the city can destroy or diminish the water power of Mr. Soden, it must make compensation. We think the statute under which the city was pro-

Burhans v. Hutcheson.

ceding broad enough to include the condemnation of water; so that, if the parties cannot agree, proceedings may be had for condemnation, and in such proceedings plaintiff can recover compensation for such injuries as he is able to prove.

The judgment will be affirmed.

Judgment affirmed.

All the justices concurring.

NOTE BY THE REPORTER.—In *Garwood v. New York Central, etc., Railroad Company*, 68 N. Y. 400, a railroad company, a riparian owner, diverted the water of a creek for its use in furnishing water to its locomotives so as to perceptibly reduce the volume of water flowing therein and to materially reduce the grinding power of the mill of plaintiff, a riparian owner below the railroad company, and in consequence thereof he sustained damage to a substantial amount. *Held*, that plaintiff was entitled to an injunction restraining the railroad company "from diverting the water to the injury of plaintiff." The cases of *Elliott v. Fitchburg R. Co.*, 10 Cush. 191; *Earl of Sandwich v. Great N. R. Co.*, L. R., 10 Ch. D. 707, distinguished. In such a case preventive relief is proper, 2 Story Eq. Jur., § 927; *Gardner v. Newburgh*, 2 Johns. Ch. 162; 7 Am. Dec. 526; *Swinton Water-Works Co. v. W. & B. Canal Co.*, L. R., 7 Eng. & Ir. Ap. Cas. 697; *Campbell v. Seaman*, 63 N. Y. 568; s. c., 20 Am. Rep. 567. Each riparian owner has the use of the water *ad lavandum et portandum* for domestic purposes and his cattle, though some portion be exhausted, and this without regard to the effect upon the lower owner. He may use for irrigation or manufacturing, but this privilege is connected with the land through which the stream runs, and cannot be exercised if thereby the lawful use of the water by a lower proprietor is interfered with to his injury. *Miner v. Gilmour*, 12 Moore P. C. 156; *Tyler v. Wilkinson*, 4 Mason, 397. The railroad company did not merely use the water, returning it to the stream, but diverted it from the land. The fact that plaintiff as well as the railroad company used the water for artificial purposes would not affect plaintiff's rights. The case presents no exception to the rule that a riparian proprietor has no right to divert any part of the water of the stream into a course different from that in which it has been accustomed to flow, for any purpose to the prejudice of any other riparian proprietor. This is the doctrine of the civil and the common law (3 Kent Com. 585), and it stands upon the familiar maxim *sic utere tuo ut non alienum laedas*.

BURHANS V. HUTCHESON.

(25 Kans. 625.)

Mortgage — assignment — subsequent payment to mortgages — notice.

A *bona fide* indorsee of a negotiable note, and assignee of a real mortgage executed as security therefor, is not prejudiced by a conveyance of part of the mortgaged premises, thereafter made without his knowledge or consent by the mortgagor to the mortgagee; although the assignment is not recorded or notice of it given to the mortgagors, and a statute provides that the recording of the assignment of a mortgage shall not be deemed notice to the mortgagor, so as to invalidate payments to the mortgagee.

Burhans v. Hutcheson.

ACTION on notes secured by a real mortgage executed by Hutcheson to Brandon, and assigned before maturity for value to Burhans. Defense, that some of the mortgaged land had subsequently been conveyed by Hutcheson to Brandon in payment of the notes and satisfaction of the mortgage, Burhans having no knowledge or notice of the assignment. The defendant had judgment below.

B. J. Horton, for plaintiff in error.

S. O. Thacher and *John Hutchings*, for defendant in error.

HORTON, C. J. [After stating the case.] The principal question therefore in the case is, whether the conveyance of the seventy acres of land by Hutcheson to Brandon on March 9, 1875, was a payment of the notes and a valid satisfaction of the mortgage, no actual notice having been brought home to the former of the assignment before maturity of the notes and mortgage to plaintiff. The court below seems to have held the conveyance a full payment and satisfaction of the mortgage. From the conclusions of law stated, the court must have decided that where a negotiable note is secured by mortgage on real estate, and both are assigned by indorsement thereon before maturity to a *bona fide* purchaser, the mortgage is taken subject to all payments made by the mortgagor to the mortgagee at any time before actual notice to the mortgagor of such assignment. Counsel for defendants claim this to be the law, and have cited many respectable authorities in support thereof. We think the doctrine thus announced not sustained by reason or sound policy, and if adopted it would be an unfortunate obstacle to commercial transactions so common in this State as the sale and transfer of negotiable paper secured by real-estate mortgages, and that such a doctrine is not in accord with the previous decisions of this court controlling the principles of law applicable to negotiable paper secured by such mortgages. In this State, the common-law attributes of mortgages have been by statute wholly set aside, and the ancient theories concerning such mortgages demolished. The mortgage is a mere security, creating a lien upon the property, but vesting no title. The debt secured by the mortgage is the principal thing, and the mortgage the mere incident following the debt wherever it goes, and deriving its character from the instrument which evidences the debt. Here, the negotiable notes are the

principal evidence of the debt, and the mortgage is merely ancillary; the mortgage follows the notes; whoever owns the notes, owns the mortgage. *Chick v. Willets*, 2 Kans. 385; *Swenson v. Plow Co.*, 14 id. 387. In the late case of *Carpenter v. Longan*, 14 Wall. 271, Mr. Justice SWAYNE, speaking for the court, says:

“The note and mortgage are inseparable. The former is essential, the latter is an incident. An assignment of the note carries the mortgage with it, while the assignment of the latter alone is a nullity. * * * All the authorities agree that the debt is the principal thing, and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same right in regard to both. There is no departure from any principle of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid, the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action where no such relation of dependence exists.”

Counsel for defendants say, that conceding the correctness of the general doctrine laid down in *Carpenter v. Congan*, *supra*, yet, the adoption of § 3, ch. 68, Comp. Laws of 1879, has placed a legislative restriction upon the negotiability of all mortgages executed since its adoption, and that this statute throws upon the assignee of negotiable paper secured by real-estate mortgages, the burden of personal notification to the maker of the mortgage of the change of ownership, if he would cut off future payments to the mortgagee.

Our attention is called to *Johnson v. Carpenter*, 7 Minn. 176, and to *Van Keuren v. Corkins*, 66 N. Y. 77, interpreting a statute like ours. In *Johnson v. Carpenter*, the mortgage is treated as a chose in action standing alone. In *Van Keuren v. Corkins*, the suit was upon a bond and mortgage, and it does not appear that the bond was negotiable. However, *Johnson v. Carpenter*, and the other authorities referred to in the same direction, are not satisfactory to us, or rather they are not in harmony with the law of mortgages in this State. Section 3 speaks of the recording of the assignment of

Whitaker v. Hawley.

the mortgage, and does not by its terms refer to negotiable paper, and it seems to us a strained interpretation to hold its provisions applicable, where a debt is evidenced by a negotiable note, secured by mortgage upon real estate, when such mortgage is merely auxiliary thereto, and follows the note wherever it goes, deriving its character from such instrument. A better interpretation, and one clearly more in accord with the law of mortgages in this State, is that such section has reference only to a mortgage standing alone, or one securing debts and notes of a non-negotiable character. Under this interpretation, section 3 of the statute is not nugatory, but has ample room for operation. As Brandon had parted with all his interest in the notes and mortgage before accepting the conveyance from Hutcheson and wife, and had no interest therein at the time, such conveyance did not extinguish the mortgage held by plaintiff; nor was it necessary for the plaintiff to record an assignment of the mortgage to protect himself from the payment to the mortgagee. The notes and mortgage went together, and the mortgagor, having made the conveyance and payment without a surrender of the notes or the mortgage, did so at his peril.

The judgment of the District Court will be reversed, and the case remanded with directions to enter judgment for plaintiff for the amount due him upon the notes, and for a foreclosure of his mortgage, in accordance with the views herein expressed.

Judgment reversed.

All the justices concurring.

WHITAKER V. HAWLEY.

(25 Kans. 674.)

Landlord and tenant — lease of realty and personalty — destruction of personalty by fire — insurance for landlord.

Where real and personal property are leased by a single instrument for an amount in gross, and the personalty is a substantial part of the property leased, its destruction without the fault of the lessee, by fire or otherwise, entitles the lessee to an apportionment of the rent; and where the lease binds the lessee to insure the personalty in a specified amount for the benefit of the lessor, and he fulfills this covenant, the lessee is relieved by destruction of all the leased property by fire from the subsequent payment of any rent, although he has covenanted to keep the premises in repair. (See note, p. 288.)

Whitaker v. Hawley.

ACTION for rent on a written lease of premises consisting of a beef and pork packing house, with engines, boilers, machinery, scales and fixtures, elevator machinery, steam tanks, railroad switch and scales, wagon scales, for two years, at \$275 a month ; the lessee to insure the machinery and attachments for the benefit of the lessor, at their insurable value ; to keep the premises in good repair, and to surrender them in the like condition as when taken, reasonable use and wear and damages by the elements excepted. All the leased property was subsequently during the term substantially destroyed by fire, without the fault of the lessee. The opinion states other facts. The defendant had judgment below.

Lucien Baker, for plaintiff in error.

Stillings & Stillings, for defendants in error.

BREWER, J. [After stating the facts, and considering at considerable length whether the common-law liability of a lessee of real estate to pay rent for a term of years, in spite of the destruction of the buildings by fire without his fault, prevails in Kansas, and doubting that it so prevails.*] But passing to the second question, we think the law is, that where real and personal property are leased by a single instrument, for an amount in gross, and the personalty is a substantial part of the property leased, its destruction without the fault of the lessee, by fire or otherwise, entitles the latter to an apportionment of the rent. The authorities are not uniform upon this question. In the case of *Bussman v. Ganster*, 72 Penn. St. 285, a lot and building with counters, shelving and other fixtures were leased for a sum in gross. The building and fixtures having been destroyed by fire, an apportionment of the rent was sought, but denied. SHARSWOOD, J., speaking for a majority of the court, said : "In the case of a lease of chattels with a house, where the chattels are all destroyed, without fault of the tenant, the better opinion seems to be that it affords no ground of defense *pro tanto*." But the authorities cited do not bear him out in this opinion. Among others, he cites *Taverner's case*, 1 Dyer, 56, but that supports the right of apportionment as follows :

Trinity Term, 35 Hen. 8 ; *Richards Le Taverner's case*, 1 Dyer,

* See *Coogan v. Parker* (3 S. C. 255), 16 Am. Rep. 666 ; *Cowell v. Lumley* (20 Cal. 151) 9 Am. Rep. 430.

Whitaker v. Hawley.

56. A man makes a lease for years, of land and of a stock of sheep, rendering certain rent, and all the sheep died. It was asked upon the indenture of *Richards Le Taverner* whether this rent might be apportioned? And some were of opinion that it should not, although it is the act of God, and no default in the lessee or lessor; as if the sea gain upon part of the land leased, or part is burned with wild fire, which is the act of God, the rent is not apportionable, but the entire rent shall issue out of the remainder. Otherwise is it if part be recovered or evicted by an elder title—then it is apportionable. And of this opinion were BROMELEY, PORTMAN, HALES, Sergeants; LUKE, J.; BROOKE, and several of the Temple. But MARVYNE, BROWN, JJ.; TOWNSHEND, GRIFFITH, and FOSTER, *e contra*; but all thought it was good equity and reason to apportion the rent. And afterward this case was argued in the readings by More, in the following Lent, and it seemed to him, and to BROOKE, HADLEY, FORTESCUE and BROWN, JJ., that the rent should be apportioned, because there is no default in the lessee.

See, also, *Womack v. McQuarry*, 28 Ind. 103.

Indeed, there would seem to be no just ground for denying apportionment, even though the common-law doctrine in respect to leases of real estate be conceded. Mingling real and personal property in a single lease ought not to prevent the accepted rules concerning the hiring of each to be applied, whenever application is possible. So that if plaintiff ought to recover for the rent of the building, the rental named in the lease should be reduced by the proportionate value of the rental of the machinery and other personal property.

With reference to the last proposition, it will be borne in mind that the obligation to pay rent after the destruction by fire was always rested upon the part of the contract therefor. It was never doubted but that by contract this obligation might be limited or removed. The parties might stipulate for rebuilding by either, for the absolute termination of the lease, or any other change in their respective obligations and rights. Here the contingency of fire was foreseen and provision made therefor. And whether that provision was ample or not, is no more a matter of present inquiry than whether the rental stipulated for was excessive or insufficient. The contract was, that the tenant should keep the personal property insured at its insurable value in some responsible company for the benefit of the landlord. Thus in case of fire the landlord would

receive pay for his property destroyed. Rent is compensation for the use, and implies the continued existence of the property to be used. Here this compensation was named in the fore part of the lease as “\$275 per month as rent for the use of the premises and property above described.” Beyond this compensation was the stipulation for insurance. By the lease, then, as a whole, the tenant was to pay rent for the use of the property; and in addition, purchase a guaranty to the landlord that in case such use should fail by reason of fire, he should receive the value of the property destroyed. When the latter comes into force, is it not plain that the former ceases? Was not the one intended as a substitute for the other? Suppose, instead of contracting to procure insurance, the tenant had contracted to himself insure the property, so that in case of destruction by fire he was bound to pay the value; would it for a moment be doubted that the rent ceased when the obligation to pay the value arose? Apply such a contract to the case at bar; could it be held that a party contracted, that in case of destruction by fire the day after he had taken possession, he would pay to the landlord the value of the property leased, and also pay \$275 a month rent for its use for the ensuing two years? Before a contract could be so interpreted, it must appear, not merely that the language will justify such an interpretation, but also that it necessarily excludes every other construction. Paying value is equivalent to purchase, and who would think if the right to purchase at a stipulated sum was inserted in the lease, that rent could be enforced after such purchase? If the contract to pay value to insure is so manifestly inconsistent with the obligation to pay rent that the latter gives way when the former becomes operative, the same principle applies when the contract is to furnish insurance. While the contrast is not so glaring, it is still obvious that the insurance is to take the place of the rent. The insurance is a provision to compensate the landlord when the rent fails, and not a provision to double the rent.

Counsel refers us to cases in which it was held that the fact that the landlord had collected insurance on the building did not affect the tenant's liability on his contract to pay rent; but that is not the question here. It is not what either party may do voluntarily and for his own benefit without affecting the contract liability of the other, but how far does one stipulation in a contract modify and limit another? It might be conceded that the landlord could

Whitaker v. Hawley.

place any insurance on his property, and in case of fire collect it even to the full value of the building, or that the tenant could voluntarily place a like insurance for his own or his landlord's benefit, and that such separate, voluntary act of either in no manner affected the contract obligations of either to the other, and still such concession would throw no light on the question as to the scope and intent of a single contract which couples an express promise to pay rent with an equally express promise to insure or to furnish insurance. Force can be given, it is true, to each promise to the full extent; the tenant can pay rent to the end of the term whether the building burn or not, and he can furnish the insurance, and if the building burn, the landlord may receive the value, and so each promise in the letter can be complied with. But the question is, did the parties by this contract intend any such result? Did they contemplate this double burden on the one party and double blessing to the other? We think not, but rather that in harmony with justice and equity they intended that rent should be paid while use was possible, and that when use failed through fire the landlord should receive the value in insurance in lieu of rent.

But it is said that the insurance contracted for was simply on the personalty; that such insurance, even if it abates the rent, abates it only on the personalty, and that if defendants wish any abatement they must show the relative rental values of the real and personal property. This is a misconception. The rent was in gross for the real and the personal property. The contract concerning insurance was a single provision; it shows that the parties contemplated the possibility of fire, and made their stipulations accordingly; and whether that provision was for insurance in a definite amount on all the property, or the full value of either the real or the personal, is immaterial; it is the contract provision for the possibility of fire. Doubtless the landlord was willing to pay for the insurance on the building, if in addition to rent for the use of his property he could also obtain payment of the insurance on the machinery, etc.

The case of *Bricker v. Bricker*, 11 Ohio St. 240, illustrates this proposition. In that case, which was an action on the covenants in a deed, the deed contained a covenant of general warranty and one against incumbrances. This latter was a special one, and excluded the incumbrance, which was afterward enforced against the land. This exclusion was not direct and by naming the excluded incumbrance, but by implication and from naming a certain class

of incumbrances against which the grantor covenanted. Yet the court held that the covenant of general warranty, which alone would have covered this incumbrance, was limited by the covenant against incumbrances, and as that excluded this particular incumbrance, it was outside both the covenants. Several authorities are cited in the opinion in which general covenants and promises have been limited and qualified by special ones in the same instrument, and this without any express declaration of limitation. The mere presence of the special promise is adjudged a declaration of the limitation. So in this case, the general contract to pay rent is limited by the special provision concerning insurance.

Again, it is to be noticed that this lease is specially of the building and machinery. Its language is not that a certain tract of ground with the buildings thereon is leased, but that a certain building and some named personal property are leased, together with the ground upon which they are situated. This shows that the thought of the parties was on the hiring of that property which was liable to destruction, and not to the mere place upon which it rested, a very different thought from that which underlies the hiring of a farm, where the use of the ground as such is the matter of consideration.

But it may be said that this gives undue force to the insurance clause, because the property might be only partially destroyed by fire: and what then? May the lessee throw up the entire lease, or is it binding upon him, subject to an abatement of the rent? It will be time enough to decide that question when it arises. For the present, all we decide is, that the interpolation of such a stipulation concerning insurance does away with the strict rule of the common law, even if it has any force in this State and that where there is a total destruction by fire, and the entire beneficial use is lost to the lessee, he may rescind the lease and be relieved from his promise to pay rent. Of course, other considerations may apply where the soil itself has a beneficial use, or there is only a partial destruction. Those cases will be considered when they arise.

Upon the record as it stands before us, we think the decision of the District Court is correct, and it must be affirmed.

Judgment affirmed.

All the justices concurring.

Whitaker v. Hawley.

NOTE BY THE REPORTER. — 1. *As to the apportionment.* In *Womack v. McQuarry*, 28 Ind. 103, there was a lease of a saw-mill and one room in an adjoining factory. Both being destroyed by fire, it was held that the tenant was discharged from rent for the room, but not for the saw-mill. The court said: "This exception applies only to cases where the demise is of part of an entire building, as a cellar or upper room; and it is founded upon the idea that in such cases it is not the intention of the lease to grant any interest in the land, save for the single purpose of the enjoyment of the apartment devised, and when that enjoyment becomes impossible by the destruction of the building, there remains nothing upon which the demise can operate." This is the doctrine of *Winton v. Cornish*, 5 Ohio, 477; a lease of a store-room and cellar. Here the court asked: "Can the lessees of cellars, holding by such leases as this, cover themselves in their cellars and prevent the entry of their landlords to reconstruct their houses? Can the lessees of basement stories of public buildings, with leases such as this, when the edifices are destroyed by fire, roof the basement story, and prevent the agents of the public from entering to reconstruct the edifice?" This case was followed in *Kerr v. Merchants' Exchange Co.*, 8 Edw. 815, a lease of a room in the merchants' exchange. The same was held in *Graves v. Berdan*, 26 N. Y. 403, a lease of upper rooms, two judges dissenting, and in *Stockwell v. Hunter*, 11 Metc. 443, a lease of a cellar, citing the *Kerr* and *Winton* cases.

The cases of leases of real and personal property are very rare. In *Bussman v. Ganster*, 72 Penn. St. 285, it is said, *obiter*: "Even in the case of a lease of chattels with a house, where the chattels are all destroyed without any fault of the tenant, the better opinion seems to be that it affords no ground for defense *pro tanto*." In *Fay v. Holloran*, 85 Barb. 235, it is said: "Rent cannot be reserved out of chattels personal. If such chattels are demised with land, at an entire rent, the rent issues out of the land only." So, in respect to a similar lease, it is held in *Jones v. Smith*, 14 Ohio, 606, that the rent cannot be apportioned between lessor and assignee; but this was where the assignment did not mention the personalty. "If the plaintiff recover, it is because the rent reserved is in respect to the land, and not increased by the personalty." To the same effect are *Sutcliffe v. Atwood*, 15 Ohio St. 185; *Forewell v. Dickenson*, 6 B. & C. 251.

On this point the court in the principal case cite *Le Taverner's case*, 1 Dyer, 15, where the lease being of sheep and land, and the sheep died, the rent was apportioned, and conclude: "Indeed, there would seem to be no just reason for denying apportionment, even though the common-law doctrine in respect to leases of real estate be conceded. Mingling real and personal property in a single lease ought not to prevent the accepted rules concerning the hiring of each to be applied whenever application is possible."

2. *As to the insurance.* In *Leeds v. Cheetham*, 1 Sim. 146, where the tenant had covenanted to repair, it was held that a tenant has no equity to compel his landlord to apply insurance moneys received by him on the destruction of the demised buildings, in rebuilding, or to restrain the collection of rent until the same are so applied. The court said: "The plaintiff might have provided in the lease for a suspension of the rent in the case of accident by fire; but not having done so, a court of equity cannot supply that provision which he has omitted to make for himself." The court laid stress on the fact that the landlord's insurance was designed to protect him against his covenant in the lease to rebuild certain portions in case of fire, and although there was a surplus, "upon what principle can it be that the plaintiff's situation is to be changed by that precaution on the part of the defendant, with which the plaintiff had nothing whatever to do?"

This decision was followed in *Loft v. Dennis*, 1 El. & El. 474, an action for use and occupation. Lord CAMPBELL, C. J., said: "I cannot see why the fact of the landlord having received the insurance money entitles the tenant to be relieved from his liability for rent any more than if the landlord had won that amount in a lottery; there is no privity in either case between the defendant and the party from whom the money comes."

These two cases are cited with approval *arguendo*, in *Sheets v. Seldon*, 7 Wall. 416, 424.

The same doctrine was declared in *Bussman v. Ganster*, 72 Penn. St. 285, where the lease included "counters, shelving, and other fixtures." So in *Magaw v. Lambert*, 3 Penn. St. 444, it was thus held, the court saying: "It was not the rent which was

Intoxicating Liquor Cases.

insured, but the premises out of which it issued ; and the tenant could not say that the company had paid it for him."

In *Kingsbury v. Westfall*, 61 N. Y. 356, the same doctrine was extended to the lessee's surety. The court said: "The plaintiff was under no obligation to the lessees of the premises, or the defendant, to procure an insurance on the buildings against loss by fire. It was an act of prudence on his part to appropriate from his own means, derived from that property or other sources, as should be necessary to save himself from the ultimate loss of his buildings by that cause. I have not been able to discover any claim, legal or equitable, in favor of the lessees or the defendant upon that fund, or any part of it, to indemnify them against loss. It was not procured by the means or for the benefit of either of them ; and notwithstanding it was thought by the chancellor, in *Brown v. Quilter*, Amb. 621, that the fact that the landlord received the insurance money for the house which was burned, and did not rebuild it, raised an equity in favor of the tenant ; the suit was settled, no judgment was rendered in it, or principle settled justifying its being regarded as authority. If the plaintiff had the day before the fire sold the premises for their full value, reserving to himself the rent to accrue, and in that way, instead of by insurance, escaped loss, it clearly would be no ground for diminishing the rent reserved for the residue of the term. No good reason can be assigned why an abatement or the rent should not be allowed as well in the one case as in the other." In this case there was no covenant to keep in repair.

In *Salmon v. Matthews*, 8 M. & W. 827, it was thought that the rent might be apportioned, but the case was more strongly put on another ground. In *Newman v. Anderson*, 5 B. & P. 224, it was held that the rent was distrainable. So in *Mickle v. Miles*, 81 Penn. St. 20. But in *Newton v. Wilson*, 3 Hen. & M. 470, rent from chattels, parcel of the demise, was held apportionable. (In this case the lease was of land and a mill and a black slave miller.) The court referring to Gilbert's doubt of the apportionability in case of a lease of land and sheep (*Rents*, 187). regard the question in the light of possibility of computation only. They say: "If the tenant had been evicted of the 200 acres of land adjoining the mill, but not of the mill itself, or vice versa, the rent should have been apportioned according to the real value of that which remains in his hands. Why might not the jury, upon similar principles, have apportioned the loss which the tenant sustained by the departure of the miller ?" etc.

The *Albany Law Journal*, reviewing the principal case (24 Alb. L. Jour. 365,) says: "In regard to the obvious objection that the insurance was only on the personalty, the court say: 'The contract concerning insurance was a single provision ; it shows that the parties contemplated the possibility of fire, and made their stipulations accordingly ; and whether that insurance was for a definite amount on all the property, or the full value of either the real or the personal, is immaterial ; it is the contract provision for the possibility of fire.' The defect in this reasoning is this : it is the land that is rented, and the land cannot be insured. and remains to the tenant after the fire, and he may use it as he pleases. The doctrine of apportionment we assent to : the other is more doubtful."

INTOXICATING LIQUOR CASES.

(23 Kans. 751.)

Constitutional law -- excise -- statutory construction.

A statute prohibited the sale of intoxicating liquors, save by licensed druggists for certain excepted purposes. *Held*, constitutional.

A statute defines intoxicating liquors as "all liquors and mixtures, by whatever name called, that will produce intoxication." *Held*, not to embrace medicines and toilet articles, not ordinarily used as beverages, such as tincture of

Intoxicating Liquor Cases.

gentian, bay rum, and essence of lemon, although containing alcohol. Whether it embraces "McLean's Strengthening Cordial and Blood Purifier," a mixture of whiskey, syrup of tulu and syrup of wild cherry, and "Sherman's Prickly Ash Bitters," is a question of fact.

INFORMATIONS for illegally selling intoxicating liquors. The opinion states the facts.

W. A. Johnston, attorney-general, and *A. H. Vance*, county attorney for Shawnee county, for the State.

W. C. Webb and *George R. Peck*, for defendants.

BREWER, J. These cases present for our consideration some inquiries concerning the prohibitory law of last winter. Laws 1881, ch. 128. These inquiries relate to that portion of the statute which attempts to regulate the sale of intoxicating liquors for medical, scientific and mechanical purposes. Nothing is said as to that portion which prohibits the manufacture or sale of such liquors for use as a beverage. That, for the purposes of these cases, is conceded to be constitutional and valid. And in reference to that which regulates, two distinct classes of inquiry are presented: one is as to the validity of this portion of the law taken as a whole, and the other is as to its scope and extent, if it be adjudged valid. For a proper understanding of these questions, a brief reference to the statute is essential. Section 1 of the statute prohibits the sale of intoxicating liquors, with a proviso that they may be sold for the excepted purposes as provided in the act. Then section 2 provides that no one shall sell for the excepted purposes "without first having procured a druggist's permit therefor from the Probate judge."

Upon this arises the first matter for our consideration. It is insisted that the jurisdiction of the Probate Court is defined by the Constitution (Const., art. 3, § 8,) and cannot be increased by legislative action, *expressio unius, exclusio alterius*; that while in section 2 of the act the Probate judge is named, the statute as a whole shows that the power was conferred upon the Probate Court as a court; that it is not within the constitutional prescription as to the powers of such court; and as a conclusion therefrom, that the court having no power to issue a permit, any permit issued would be worthless, and a provision or scheme resting upon such a permit must fall with it. It may be conceded that if the permit is worth-

Intoxicating Liquor Cases.

less, this entire portion of the statute also fails, and the sale for the excepted purposes is without limitation or restriction. That such permit has no legal force was the opinion of the learned judge of the first judicial district, from whose decision four of the cases before us are brought.

We cannot yield our assent to this view. We concede the force of the argument in its favor; and if the question were a new one in this court, entirely unembarrassed by prior adjudications, it would require careful consideration, and might possibly be differently determined. But we feel ourselves concluded by past decisions, decisions running back to the early history of this court, some of them made before any of the present justices were members thereof. No matter of absolute right or personal liberty, but one of technical limitation only, is involved in those decisions, and hence they should not be lightly departed from. *State v. Bosworth*, 13 Vt. 413. In this case the court well says: "No questions arise more frequently in this country than those which involve the construction of the Constitution and the powers of the different branches of the government, and in many of these there is no doubt an honest difference of opinion. Where, then, is the security of individual or corporate rights if these questions are to be considered as always open; if no acquiescence, even though sanctioned by a judicial decree, is to be considered as settling them?" We may remark that while the jurisdiction of the Probate Court is defined by the Constitution, there is in that instrument no prohibition on the judges holding other offices of trust and profit, as there is in reference to the District judges and justices of this court. Art. 3, § 13. Hence he may hold other offices whose duties are not inconsistent with those of the Probate Court, and the legislature may cast upon the person holding the office of Probate judge other duties and cares than those of the court over which he presides, even if it may not enlarge the jurisdiction of the Probate Court. This thought underlies the past rulings in this court, the past legislation of the State; and to disturb them now would unsettle many proceedings and titles. In the case of *In re Johnson*, 12 Kans. 102, Justice VALENTINE, speaking for the court, notices the various legislation concerning the many offices and duties cast upon the Probate judge, and repetition here would be useless. It may be conceded that it would be more logical and less objectionable to say that the legislature may create an office with specified duties and then make the

Intoxicating Liquor Cases.

person holding the position of Probate judge the incumbent of such office, than to hold that certain duties may be cast directly upon the person holding the office of Probate judge. But substance is above form. That which may properly be done in one way ought to be upheld, if possible, though done in another way; and an act of the legislature should be sustained whenever by any reasonable construction the act can be brought within the scope of the legislative power. If in this case the legislature had created the office of commissioner of licenses, and provided that the Probate judge should *ex officio* be such commissioner, there could be little doubt of the constitutionality of such an act. Substantially the same thing is accomplished by casting upon him the duties named in this act. And having in view the duty of upholding an act of the legislature wherever possible, the past decisions of this court, the general recognition by all departments of the government—executive, legislative and judicial—of the correctness of such exposition of constitutional limitations, and the substance rather than the form of this proceeding, we think the casting of this duty respecting permits upon the person holding the office of Probate judge must be adjudged within the power of the legislature. Clearly the act gives the power to the Probate judge rather than the Probate Court. Only incidentally is the court mentioned, and such incidental mention ought not to overrule the force of the express naming of the judge in granting the power, sustained as it is by the frequent references to him all through the act.

We pass then to the second objection, and that is, that this portion of the statute must be pronounced unconstitutional and void because it is class legislation; because it restricts the privilege of dealing in liquor to one class, the druggists, and thus debars many from engaging in a business which is profitable, and by some desired. This objection is not very strenuously urged, and cannot be sustained. It will not be doubted that the police power of the State is broad enough and strong enough to uphold any reasonable restrictions and limitations on the keeping, use or sale of any substance whose keeping, use or sale involves danger to the general public. The storage of powder or explosive and highly inflammable oils may be forbidden within city limits. The legislature may require railroads to fence their tracks, dangerous machinery to be everywhere inclosed, poisons to be labelled when sold, the practice of any profession requiring skill and knowledge to be confined to

Intoxicating Liquor Cases.

those who have passed a certain examination or pursued a prescribed course of study. By virtue of the same power, it may commit the sale of liquor to any particular class of persons which by reason of its special training and habits it may deem peculiarly fit for such duty. In the case *In re Ruth*, 32 Iowa, 253, the court says: "It has been found that the health and lives of the people demand that a few licensed persons be empowered to sell these liquors for lawful purposes, and that all others be forbidden to deal in them. Of those who are authorized, the law requires satisfactory proof of good moral character. In this respect, it differs not from all license laws which bestow privileges upon fit and proper persons making application therefor. These laws have always been sustained." Here the sale of liquor being allowed for medical purposes, druggists who deal in medicines are properly named as a suitable class to whom to intrust such sale. The law does not attempt to prescribe who may and who may not become druggists. That question each individual settles for himself. It simply says that only druggists shall sell liquor. It is like a law which should forbid any but licensed engineers from running the engine of a passenger train, any but licensed attorneys from appearing for clients in a court of record, any but medical graduates from engaging in the practice of medicine. No law of this kind interferes with individual liberty in its true sense. Such laws protect the public only in matters involving risk and danger from the acts of unfit and improper persons. They cannot be adjudged class legislation in any objectionable and unconstitutional sense of the term.

We pass now to the second branch of these cases, the inquiry as to the scope and extent of the statute. What liquors, using that term in its broadest sense, are included? The first section prohibits the manufacture or sale of any spirituous, malt, vinous, fermented, or other intoxicating liquors. Now this language is broad and comprehensive. "Other intoxicating liquors" extends the scope so as to include every liquor which comes within the general definition of intoxicating liquor. And yet, if this section stood alone, there would be little doubt as to its meaning. It would include only such liquors as are used as a beverage. No one would think of extending it to cologne, extract of lemon, or any of those many preparations which, although they contain alcohol, the intoxicating factor in all drinks, are never used as beverages. But section 10 casts the doubt upon the statute. It reads: "All liquors

Intoxicating Liquor Cases.

mentioned in section one of this act, and all other liquors or mixtures thereof, by whatever name called, that will produce intoxication, shall be considered and held to be intoxicating liquors within the meaning of this act." This section, whose language is unfortunately chosen, is the one which has provoked this litigation, and has tended to create so much prejudice against the statute; for its letter reaches to preparations which no man can believe were within the intent of the legislature, and any interference with whose sale, if within the power of the legislature, would be felt by every one to be unnecessary and unreasonable. Alcohol is the intoxicating principle, the basis of all intoxicating drinks. Whatever contains alcohol, will, if a sufficient quantity be taken, produce intoxication. Hence, whatever liquor contains alcohol is within the statute. So reads its letter. But when we come to inquire as to the liquors which contain alcohol, we find a lengthy list of fluids which are never used as beverages. Cologne, extract of lemon, bay rum, paregoric, tincture of gentian and many other medicinal preparations contain alcohol, and all will produce intoxication. They are seldom used as a beverage, and yet they may be. Intoxication produced by drinking bay rum has been known. Yet few will drink it. Its uses are for the toilet. But three of the cases before us are prosecutions for the sale of bay rum, essence of lemon and tincture of gentian, respectively. These preparations contain alcohol, and will each, it is charged, produce intoxication. If the statute includes such articles, many of them are absolutely and wholly shut out from sale. The excepted purposes in the statute are "medical, scientific and mechanical." But toilet and culinary purposes are strictly included within no one of the three. The lady who desires cologne for her toilet purposes cannot get a physician's prescription therefor, nor file an affidavit that she wants it for scientific or mechanical purposes, and yet only in these ways does the act provide for sales. Did the legislature intend interference with such articles? And if not, what is the proper construction to be given to the language in said section 10? We have had occasion to notice heretofore the cardinal canon of construction, which is that the intent when ascertained governs, and to that all mere rules of interpretation are subordinate. *State v. Bancroft*, 22 Kans. 205. The letter does not always express the intent. "A thing which is within the intention of the makers of a statute, is as much within the statute as if it were within the letter; and a

Intoxicating Liquor Cases.

thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers ; and such construction ought to be put upon it as does not suffer it to be eluded." *Holmes v. Carley*, 31 N. Y. 290 ; Bac. Abr., stat. 1, §§ 5 and 10, and authorities cited. The familiar illustration is that when it was enacted "that whoever drew blood in the streets should be punished with the utmost severity," it was held not to include a surgeon who opened the vein of a person having a fit in the street. Plowden thus quaintly expresses the same thought in his Commentary, upon the case of *Eyston v. Studd*, 2 Plow. 465. "It is not the words of the law, but the internal sense of it, that makes the law, and our law (like all others) consists of two parts, viz., of body and soul ; the letter of the law is the body of the law, and the sense and reason of the law are the soul of the law, *quia ratio legis est anima legis*. And the law may be resembled to a nut, which has a shell and a kernel within ; the letter of the law represents the shell and the sense of it the kernel ; and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit from the law if you rely upon the letter, and as the fruit and profit of the nut lie in the kernel, and not in the shell, so the fruit and profit of the law consist in the sense more than in the letter. And it often happens, that when you know the letter, you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive." Doubtless the letter is first to be considered in order to determine the intent of the legislature, for the courts may not read a law simply as they wish it should read. But other matters may also be considered, and among them the evils sought to be remedied. It was resolved by the Barons of the Exchequer in *Heydon's case*, 3 Rep. 7, as follows :

"For the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered : First, What was the common law before the making of the act ? Second, What was the mischief and defect against which the common law did not provide ? Third, What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth ? And fourth, The true reason of the remedy."

Now what was the evil sought to be remedied by this statute, and the constitutional amendment of which it was an outgrowth ? It

Intoxicating Liquor Cases.

was the use of intoxicating liquors as a beverage. As counsel for defendants aptly and forcibly express it, "the movement of which the amendment and the statute were the expression and the result, was not a crusade against cologne and the extract of lemon." And in this connection we quote from the careful opinion prepared by the learned judge of the third judicial district upon some of the cases now before us :

"The history of the movement which resulted in the adoption of the 'prohibition amendment,' and the enactment of the law now under consideration, and the object to be thereby secured, are too well known to give rise to any dispute. Those who voted for the amendment were not voting to prevent the use of articles common to toilet purposes or culinary use. It was no attack upon bay rum, camphor, or tincture of lemon ; it was intended to strike at such liquors and mixtures only as were in ordinary and known use as intoxicating beverages, or which, in the failure to obtain such beverages, it could reasonably and fairly be believed would be used as substitutes. It seems that this intent and object of the law must be taken into consideration as an important element in its construction ; and that while some particular preparation or 'patent medicine' might possibly in a few cases, with a few exceptional constitutions, produce effects similar to intoxication — at an enormous risk of health or life, perhaps — the real question and test to which each 'liquor' or 'mixture' is to be submitted, is about this : 'Is there reasonable danger that this will be used as — or as an equivalent substitute for — an intoxicating beverage ?' The law should receive a reasonable construction — equally removed on the one hand from a fanatical coloring, and on the other from a tendency to fritter it away."

With these general considerations, we pass to a decision of the particular questions presented. It cannot be doubted but that section 10 is broad and sweeping enough to bring within the statute every liquid which, by reason of the presence of alcohol, will produce intoxication, and this irrespective of the amount of alcohol contained, or the presence of other ingredients of such a character as to prevent any use of the liquid as a beverage. But such was not the intent of the legislature in the act, and such therefore cannot be adjudged to be its true import. And speaking for himself alone, the writer of this opinion does not hesitate to say that such a construction, if imperatively demanded by the language used, would

Intoxicating Liquor Cases.

carry the statute beyond the power of the legislature. I do not think the legislature can prohibit the sale or use of any article whose sale or use involves no danger to the general public. The habits, the occupation, the food, the drink, the life of the individual, are matters of his own choice and determination, and can be abridged or changed by the majority speaking through the legislature only when the public safety, the public health, or the public protection requires it. I do not think the legislature has the power to prohibit the raising or sale of corn, though out of it whisky may be obtained. No more do I believe that the legislature has the power to prohibit the sale of cologne, though alcohol be in it. The constitutional guaranty of "life, liberty, and the pursuit of happiness," is not limited by the temporary caprice of a present majority, and can be limited only by the absolute necessities of the public.

But the legislature never intended such a sweeping prohibition. The use of intoxicating liquors as a beverage was the evil, and the statute must be read in the light thereof. It intended to put a stop to such use, and limit the use to the necessities of medicine. Now the cases before us group themselves into three classes; and the same division is far reaching and of general application. The first embraces what are generally and popularly known as intoxicating liquors, unmixed with any other substances. Thus in one case the sale of brandy is charged. The second includes articles equally well-known standard articles, and which, while containing alcohol, are never classed as intoxicating beverages. Their uses are culinary, medical, or for the toilet. They are named in the United States dispensatory and other similar standard authorities; The formulæ for their preparation are there given; their uses and character are as well recognized and known by their names as those of a horse, a spade, or an arithmetic. The possibility of a different and occasional use does not change their recognized and established character. A particular spade may be fixed up for a parlor ornament, but the spade does not belong there. So, essence of lemon may contain enough alcohol to produce intoxication, more alcohol proportionately than many kinds of wine or beer. It is possible that a man may get drunk upon it, but it is no intoxicating liquor. Bay rum, cologne, paregoric, tinctures generally, all contain alcohol, but in no fair or reasonable sense are they intoxicating liquors or mixtures thereof. The third class embraces com-

Intoxicating Liquor Cases.

pounds, preparations, in which the alcoholic stimulant is present, which are not of established name and character, which are not found in the United States dispensatory, or other like standard authorities, and which may be purely medicinal in their purpose and effect, or mere substitutes for the usual intoxicating beverages. If not intoxicating liquors they may be "mixtures thereof" within the scope of the statute. Here belong many of the patent medicine, the bitters, cordials, and tonics of the day. Here also are such compounds as that charged in one of the informations before us, a compound of whisky, tolu, and wild cherry.

Now in reference to these several classes, we think these rules may be laid down : The first class is within and the second without the statute, and the court as matter of law may so declare. It is unnecessary, in charging the sale of whisky, or brandy, etc., to allege that it will produce intoxication ; nor will it bring the sale of essence of lemon within the statute to allege that such essence will produce intoxication. The courts will take judicial notice of the uses and character of these articles. You need not prove what bread is, or for what purposes it is used. No more need you in respect to whisky or gin on the one hand, or cologne, or bay rum, on the other. They are all articles of established name and character. In reference to the third class, the question is one of fact, and must be referred to a jury. If the compound or preparation be such that the distinctive character and effect of intoxicating liquor are gone, that its use as an intoxicating beverage is practically impossible by reason of the other ingredients, it is not within the statute. The mere presence of alcohol does not necessarily bring the article within the prohibition. The influence of the alcohol may be counteracted by the other elements, and the compound be strictly and fairly only a medicine. On the other hand, if the intoxicating liquor remain as a distinctive force in the compound, and such compound is reasonably liable to be used as an intoxicating beverage, it is within the statute, and this though it contain many other ingredients and ingredients of an independent and beneficial force in counteracting disease or strengthening the system. Intoxicating liquors, or mixtures thereof : this, reasonably construed, means liquors which will intoxicate and which are commonly used as beverages for such purposes, and also any mixtures of such liquors as, retaining their intoxicating qualities, it may fairly be presumed may be used as a beverage and become a

Intoxicating Liquor Cases.

substitute for the ordinary intoxicating drinks. Whether any particular compound or preparation of this class is then within or without the statute, is a question of fact, to be established by the testimony and determined by a jury. The courts may not say as a matter of law that the presence of a certain per cent of alcohol brings the compound within the prohibition, or that any particular ingredient does or does not destroy the intoxicating influence of the alcohol, or prevent it from ever becoming an intoxicating beverage. Of course the larger the per cent of alcohol and the more potent the other ingredients, the more probably does it fall within or without the statute; but in each case the question is one of fact, and to be settled as other questions of fact. *State v. Laffer*, 38 Iowa, 426; *Russell v. Sloan*, 33 Vt. 659; *Commonwealth v. Ramsdell*, Sup. Ct. Mass., 23 Alb. Law Jour. 414.

Entertaining these views of the true meaning and construction of this statute, the several cases before us must be disposed of as follows: In 2278, 2279 and 2281, in which cases the defendant was charged with selling bay rum, tincture of gentian, and essence of lemon, respectively, the judgment of the District Court sustaining the motion to quash the informations will be sustained. In 2280, 2295 and 2296, in which the charge was selling McLean's cordial, a preparation of whisky, tolu and wild cherry, and prickly-ash biters, respectively, the ruling quashing the informations will be reversed, and the cases remanded for trial. In 2293 and 2294, in which the defendants were convicted of selling brandy and alcohol, respectively, the judgments will be affirmed.

In these cases we have, at the request of counsel, not stopped to consider any mere technical or formal question, but have given our entire attention to the more important matters of the validity of this portion of the statute as a whole, and its general scope and extent. Matters of form and detail will be disposed of as they shall from time to time be presented in subsequent cases.

All the justices concurring.

CASES

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

LOONEY V. McLEAN.

(129 Mass. 83.)

Landlord and tenant — building occupied by distinct tenements — duty of landlord in respect to common stairway.

A landlord letting rooms in the same building to different tenants, the building having a common stairway, is bound to keep the stairway in reasonable repair, and the tenants are not to be conclusively deemed negligent in using it after learning that it has become dangerous.

ACTION for personal injuries. The opinion states the facts. The plaintiff had judgment below.

A. R. Brown & E. A. Alger, for defendant.

J. R. Murphy, for plaintiff.

COLT, J. The plaintiff's husband hired and occupied one of several tenements in the defendant's building. The jury, under the instructions given, have found that she was injured, without

fault on her part, while using a defective stairway apparently intended to furnish access to the roof of a shed used in common by the other tenants for drying clothes. They must have found also, that no other mode of access had been pointed out to the plaintiff; that no caution had been given as to the use of these steps; and that there was nothing in their appearance which would indicate to a prudent person that they were unsafe. The instructions given were sufficiently favorable to the defendant. They made him responsible only for such parts of his house as remained under his own general control and management.

There is no implied warranty in the letting of a house that it is safe and fit for habitation. A lease does not imply any particular state of the property let, or that it shall continue fit for the purposes for which it is let; unless otherwise stipulated, the tenant takes the premises as they are, and must pay the rent for the term. But this rule applies only to premises which, by the terms of the lease, have passed out of the control of the landlord into the exclusive possession of the tenant. Where a portion of a building is let, and the tenant has rights of passageway over staircases and entries in common with the landlord and the other tenants, there is no such leasing as will exonerate the landlord from all responsibility for the safe condition of that portion of which he still retains control, and which he is bound to keep in repair; as to such portion, he still retains the responsibilities of a general owner to all persons, including the tenants of his building. *Leavitt v. Fletcher*, 10 Allen, 119; *Foster v. Peyser*, 9 Cush. 242; *Readman v. Conway*, 126 Mass. 374; *Milford v. Holbrook*, 9 Allen, 17.

The case shows that the plaintiff had a simple right of access to the shed over this staircase, as incident to her occupation of the premises leased to her. The duty of the defendant, having still the possession and control of the same, was to protect her from injury in that right by the use of reasonable care on his part. The stairway was apparently intended to furnish a passageway for her use; and the defendant is responsible for injuries received by one entering upon the same by his invitation or procurement, express or implied. *Sweeney v. Old Colony Railroad*, 10 Allen, 368; *Elliot v. Pray*, id. 378.

The fact if proved, that the plaintiff had previous knowledge that the stairs were in a dangerous condition, would not be conclusive evidence that the plaintiff was not in the exercise of due care.

Hinckley v. Union Pacific Railroad Company.

Whittaker v. West Boylston, 97 Mass. 273 ; *Reed v. Northfield*, 13 Pick. 94; 23 Am. Dec. 662.

The requests for instructions, in the form presented, were properly refused.

Exceptions overruled.

HINCKLEY V. UNION PACIFIC RAILROAD COMPANY.

(129 Mass. 52.)

Negligence — payment of stolen coupon.

The promisor of an interest coupon, numbered, payable to bearer, and one of a large number outstanding overdue, having received notice that it had been stolen, and paying it to the person presenting it, without inquiry, is liable to the true owner, although he had received no offer of indemnity, had been in the habit of paying such coupons as if current, and gave notice to the true owner of the name of the person receiving payment.

ACTION to recover amount of stolen coupon. The opinion states the point.

J. C. Gray, Jr., & W. C. Loring (*J. C. Ropes* with them), for plaintiff.

S. Bartlett, for defendant.

LORD, J. There is no doubt that the coupons, of which copies are given in the agreed statement of facts, were properly declared on as promissory notes payable to bearer. *Spooner v. Holmes*, 102 Mass. 503, 507. It is well settled in this Commonwealth, that when such a negotiable promissory note is stolen from the holder before it is due, the amount of it may be recovered from the maker in an action at law, on filing a sufficient bond for his indemnification. *Fales v. Russell*, 16 Pick. 315. The plaintiff is therefore entitled to recover the amount of the coupon declared on in the first count of his declaration, on filing before judgment a sufficient bond of indemnity. The condition of such bond should be of such tenor as to save harmless the defendant against all lawful claims by any other person on account of the coupon in question, and against all costs and expenses by reason of such claims.

Hinckley v. Union Pacific Railroad Company.

The question which we are called upon by the second count to decide is whether, when a negotiable promissory note payable to bearer has been lost or stolen without the fault or neglect of the owner, and is presented for payment when long overdue, the party liable to pay it is bound by previous notice of the loss to inquire into the title of the *de facto* holder before payment.

It has been argued for the defense that the duty of the promisor in case of the loss of a coupon is a gratuitous duty, analogous to the liability of a gratuitous bailee. We cannot take such a view of this duty. It is true, as the counsel for the defendant maintains, that the liability does not arise from the contract, but from the law outside of the contract; but whatever that liability may be, it is part of the law which governs the issue and circulation of negotiable instruments, to which the maker of such instrument subjects himself by the very act of making, and from which he derives the advantage which the negotiability of his promise affords him.

It is conceded that the text-books declare generally that liability ensues from the payment of a lost negotiable instrument after notice of loss, and that no such payment will operate as a discharge against the loser, unless the party presenting the instrument for payment is required before payment to establish a clear title thereto. Chit. Bills (11th ed.), 188, 278, 279; Bayley on Bills (2d Am. ed.), 112, 113; Byles on Bills (13th ed.), 223, 224, 379; 2 Dan. Neg. Inst. (2d ed.), § 1230; Edw. on Bills and Notes, 538; 2 Pars. on Notes and Bills (2d ed.), 81, 212, 213.

It is alleged for the defense, as a circumstance calculated greatly to weaken the force of this *consensus* of text-writers, that no case has been found in which recovery has actually been had, or even sought, based upon such a liability. But it must be remembered, that upon a principle of law so important as this, the absence of decisions may be because of the long and unquestioning acquiescence in the rule; and certainly it is more reasonable thus to construe it than to attribute it to any doubtfulness or uncertainty as to the rule itself. Such doubt or uncertainty would almost necessarily lead to a judicial decision. It has unquestionably been the practice of the Bank of England for more than a century to regard notices of the loss of their notes, and to delay payment for the purpose of making inquiry into the title of the *de facto* holder. See *Solomons v. Bank of England*, 13 East, 135, note; *De la Chaumette v. Bank of England*, 2 B. & Ad. 385; *Raphael v. Bank of England*, 17 C

Hinckley v. Union Pacific Railroad Company.

B. 161. In *Solomons v. Bank of England*, the counsel for the plaintiff did not even contend that the maker of ordinary negotiable paper was not bound by notice of loss, but endeavored to establish a distinction (which was not upheld) in favor of bank-bills, saying, "If once the bank were permitted to withhold payment upon the same grounds as would warrant it in the case of bills of exchange, the confidence of foreigners would be very much shaken, and the circulation of these notes greatly diminished."

In *Miller v. Race*, 1 Burr. 452, Lord MANSFIELD makes the distinction between "securities or documents for debts" and bank-notes, that the latter, by commercial and business use, had become currency or money, universally regarded as such, in England and in other countries, and so were distinguishable from all other evidences of debt. Without defining accurately the rights of owners of commodities, or of choses in action, or of negotiable securities other than bank-notes, his decision is based upon the ground that bank-notes are money, and yet he holds, that even regarding them as money, "It may be both reasonable and customary to stay the payment till inquiry can be made whether the bearer of the note came by it fairly nor not."

In *Wheeler v. Guild*, 20 Pick, 545, Chief Justice SHAW reviews the authorities on the subject of transfer and payment of lost negotiable instruments, and says: "Most of the same principles and reasons apply alike to transfers and to payments. We think the rules deducible from the cases are these: where a party takes a bill transferable by delivery, not overdue nor otherwise apparently dishonored, for valuable consideration, in the usual course of business, and without notice, actual or constructive, that the holder came by it unlawfully or without title and has no just right to collect and receive it, the party taking it shall hold it as a valid security, notwithstanding that it has been lost by the true owner, or stolen from him, or taken by the holder as a mere agent to keep, or for other special purpose, without any authority to collect or transfer it; otherwise he shall not be deemed to have a good title to hold and enforce payment of it, or to withhold the bill itself or the proceeds of it from the party justly entitled. *Bleaden v. Charles*, 7 Bing. 246. The same rule applies to payments; if a bill be paid at maturity, in full, by the acceptor, or other party liable, to a person having a legal title in himself by indorsement, and having the custody and possession of the bill ready to surrender, and the party

Hinckley v. Union Pacific Railroad Company.

paying has no notice of any defect of title or authority to receive, the payment will be good." There is here the strongest implication of the rule, that if the party paying has notice of any defect of title or authority to receive, the payment will not be good, a rule which is in accordance with other decisions of this court.

It becomes then of great importance to determine what notice is sufficient to charge the party liable to pay with a duty of inquiry into the title of the *de facto* holder. It is clear that such notice need not be accompanied by an offer of indemnity, since the filing of a bond of indemnity merely takes the place of the filing in court of the note or other security, and such filing, as was very clearly stated by chief Justice SHAW in *Fales v. Russell*, *ubi supra*, is not a condition precedent of the right to recover, but simply an acquittance to be made on obtaining judgment. As to the time of the notice, there can be no question, that if at the very moment of payment the payer were reminded that the note which he was about to pay had been lost or stolen, it would be his duty to delay payment till the *de facto* holder had established a title to the instrument. The question before us is whether notice previously given of the loss of a negotiable instrument distinguishable by number or other ear-mark is sufficient to fix upon the party liable to pay a duty of inquiry, and of refusal to pay to a holder who cannot substantiate his title. We think that such previous notice is sufficient. Whether it is sufficient to fix such duty of inquiry upon a mere transferee it is not necessary for us to inquire, because the party liable to pay a negotiable instrument bears a relation and owes duties to the holder and loser different from those of the transferee, though it has certainly never been decided in this Commonwealth that such previous notice is insufficient to fix a duty of inquiry even upon a mere transferee, and the doctrine laid down in *Fales v. Russell*, tends strongly the other way. For a party engaged in mercantile pursuits to keep a list of notes signed by himself which he has been notified have been lost or stolen is neither impracticable nor burdensome, and is no more a hardship than any other precaution which the law merchant imposes upon those who make use of the benefits of negotiable paper, for the discouragement of fraud and the protection of the public. And the fact that an individual or a corporation does business on a very large scale is far from being a reason why such individual or corporation should be allowed to disregard any of the obligations laid

Hinckley v. Union Pacific Railroad Company.

upon those who issue only small amounts of negotiable paper. Ordinarily opportunities for fraud upon the public will increase with the increase of the business of a great corporation, and it is the duty of such a corporation to provide proportionally greater means of guarding against such fraud. If it be necessary to engage special clerks, or to devote extra time to applying the precautions imposed by the law merchant, it is no hardship, but only the natural and reasonable increase of a duty proportionate to the magnitude of the obligations of such a corporation. The statement of the treasurer of the defendant and of the secretary of the Union Trust Company has not shown that it was either impracticable or unreasonably difficult to provide for acting upon notice of lost or stolen securities; for any other purpose these statements are wholly incompetent, as is the circular of the United States treasury department, offered by the defendant.

There is another circumstance in this case which tends to fix more clearly upon the defendant the duty of inquiry, and that is that the coupon was long overdue. The maker of a coupon cannot be exempt from the liabilities which attach to all negotiable instruments when overdue. It is an elementary principle of commercial law that negotiable paper overdue carries with it, on its very face, notice of defective title sufficient to put the transferee on inquiry. *Gold v. Eddy*, 1 Mass. 1; *Vermilye v. Adams Express Co.*, 21 Wall. 138. Although the application of the simple rule to payment would be practically of rare occurrence, since notice of the loss or stealing would be given in almost every case, there is no reason why a distinction should be made in this respect between transfer and payment, and no such distinction is consistent with the language of Chief Justice SHAW in *Wheeler v. Guild*, before cited. After maturity, a coupon, like any other negotiable security, loses the protection of the law merchant, and becomes a mere chose in action. There is no presumption of law that the party presenting such a chose in action to the party liable to pay is the true holder. The fact that the defendant has deemed it convenient to conduct its business without regard to the application of the law in this respect, does not free it from responsibility. As was remarked by Mr. Justice MILLER in *Vermilye v. Adams Express Co.*, *ubi supra*, speaking of a usage to deal in government securities when overdue as if they were still current, "Bankers, brokers, and others cannot, as was attempted in this case, establish

Talbot v. National Bank of the Commonwealth.

by proof a usage or custom in dealing in such paper, which, in their own interest, contravenes the established commercial law. If they have been in the habit of disregarding that law, this does not relieve them from the consequences, nor establish a different law."

The fact that the defendant notified the plaintiff, before this suit was brought, of the name of the person to whom and of the date at which this coupon was paid, does not affect the plaintiff's right to recover in this action. The only payment which can be a discharge to the party paying is a payment to a *bona fide* holder, whose title was acquired before maturity, for value, and without notice. It may often happen that upon inquiry the title of the *de facto* holder will appear so plainly that the party paying will take very little risk in making the payment ; but the payment of a lost negotiable instrument, after notice, overdue, and without inquiry, is a payment wholly at the payer's own risk.

We think therefore that judgment should be entered for the plaintiff on both counts of his declaration, upon his filing, as to the first count, a sufficient bond of indemnity.

Judgment for the plaintiff accordingly.

TALBOT V. NATIONAL BANK OF THE COMMONWEALTH.

(129 Mass. 67.)

Negotiable instrument—insufficient presentment—recovery of amount paid on by indorser.

If a promissory note specifies no place of payment, presentment at the maker's former place of business, without inquiry for his residence, will not bind the indorser; and the note being dishonored, if the indorser pays it to the holder, he may recover the amount so paid on subsequently learning the invalidity of the presentment.

ACTION for money had and received on a promissory note. The opinion shows the facts. The plaintiffs had judgment below.

J. R. Bullard, for plaintiffs.

C. H. Drew, for defendant.

SOULE, J. When the note matured, the maker occupied a house

Massachusetts General Hospital v. Fairbanks.

in Kalamazoo. He had no place of business, and the note did not specify any place of payment. It was payable therefore at his house. It was not presented there for payment, nor to the maker elsewhere. The presentment at the place in Kalamazoo which had formerly been occupied as a place of business by the maker, without any inquiry as to his place of residence, was not a good presentment, and did not show such diligent search for the maker, and failure to find him, as would excuse a want of presentment of the note and demand of payment. *Garland v. Salem Bank*, 9 Mass. 408; *Granite Bank v. Ayers*, 16 Pick. 392; *Porter v. Judson*, 1 Gray, 175. The note therefore was not dishonored, and the plaintiffs were discharged from all liability as indorsers. They paid it under the supposition that it had been dishonored, and that their liability had been fixed. They had received notice that it had been dishonored, signed by the notary, and forwarded to them by the defendant bank. They had the right to rely on this notice, thus forwarded, as true, and the payment made by them in consequence was a payment made under a mistake of fact on their part, and they are entitled to recover the amount paid in this action. *Garland v. Salem Bank, ubi supra.*

Interest on the amount paid by the plaintiffs is recoverable only as damages for the wrongful detention of the money by the defendant. Nothing in the facts agreed shows that the plaintiffs made any demand for the money before bringing suit. Under these circumstances, interest should be computed from the date of the writ only. *Ordway v. Colcord*, 14 Allen, 59.

Judgment for the plaintiffs accordingly.

MASSACHUSETTS GENERAL HOSPITAL V. FAIRBANKS.

(129 Mass. 78.)

Contract — express, by one for board of another, merges the latter's implied.

Where an insane person is received into an asylum, on the application of others and on an express contract by third persons to pay for his board and expenses, no action can be maintained against him by the asylum therefor.

ACTION for board. The opinion shows the facts.

Massachusetts General Hospital v. Fairbanks.

D. E. Ware, for plaintiff.

G. D. Noyes, for guardian.

Soule, J. It appeared at the trial in the Superior Court that when the defendant, an insane person, was received by the plaintiff as an inmate of its asylum, she took no active part in the proceedings. She was admitted on the certificate of two physicians that she was insane, to which was appended an application for her admission signed by the keeper of the hotel at which she was boarding, together with an agreement signed by one Towne and one Wright, that they would pay her board as long as she remained there, and all expenses incurred in clothing her and in providing things proper for her health and comfort, and would remove her when discharged. To these instruments was added the order of the visiting committee of the plaintiff for her admission to the asylum as a patient. These documents taken together constitute the contract under which the plaintiff furnished what it did furnish for the benefit of the defendant. It was not her contract with the plaintiff, but the contract of Towne and Wright, binding on them so long as the defendant remained at the asylum. There was no question open as to whether their undertaking was an original one or a collateral promise. The terms of it admit of but one construction. It was an absolute agreement, in consideration of the admission of the defendant as a patient.

The evidence did not justify any inference that the defendant became liable to the plaintiff for her board and support. The plaintiff having received her under the express contract with Towne and Wright to pay the plaintiff, there was no implied contract on her part to pay any thing. There is no room for an implied contract where an express contract exists. Met. Cont. 6; *Whiting v. Sullivan*, 7 Mass. 107. If A. contract with B. to furnish board at his expense to fifty men in his employ, and B. furnishes it, there is no implied contract on the part of the boarders to pay each for his own board. And this, not because they are employed by A., but because the board was furnished on A.'s promise to pay for it. In the numerous cases in which the question has arisen to whom was credit given, no express contract in writing, absolute in its terms, existed, and in the absence of such express contract the effort was to ascertain, from the facts surrounding the transaction, to whom

Union Institution for Savings v. City of Boston.

credit was given, as an element in determining with whom the contract was made, or whether the undertaking was original or collateral. Of this character are these cases cited by the plaintiff: *Cahill v. Bigelow*, 18 Pick. 369; *Swift v. Pierce*, 13 Allen, 136; *Walker v. Moors*, 125 Mass. 352.

Under the pleadings it was competent for the guardian of the defendant to show the contract which led to the admission of the defendant to the asylum; and when that contract was established it made a complete answer to the plaintiff's claim. The judge who tried the case in the Superior Court erred therefore in refusing to rule that on the evidence the action could not be maintained, and there must be a new trial.

Ordered accordingly

UNION INSTITUTION FOR SAVINGS V. CITY OF BOSTON.

(129 Mass. 82.)

Interest—after maturity.

In an action upon a contract to pay a sum of money at a certain time with interest at a specified rate, the creditor is entitled to recover interest at that rate, not merely until the agreed time for payment of the principal, but until it is actually paid or his claim for principal and interest is judicially determined.*

BILL to enforce lien on money due for land damages. The opinion states the point. The plaintiff had judgment below.

J. A. Maxwell, for plaintiff.

J. P. Treadwell, for defendant.

GRAY, C. J. This is a bill in equity by a mortgagee of land taken by the city for the public use, and the equity of redeeming which from the plaintiff's mortgages is owned by the defendant Farnsworth, to enforce a lien upon the money due from the city for damages for such taking. By the terms of these mortgages, the amounts of the mortgage debts were to be paid in five years,

*See *contra*, *Burnes v. Anderson* (68 Ind. 202), 34 Am. Rep. 250, and note, 262.

Union Institution for Savings v. City of Boston.

which had elapsed some time before the filing of the bill, "with interest semi-annually at the rate of seven and a half per centum per annum;" and the question is, at what rate the interest is to be computed for the time since the principal sums became due.

By the Statute of 1867, chap. 56, § 1, the legal rate of interest in this Commonwealth is six per cent a year, when there is no agreement for a different rate; and by section 2, it is lawful to contract for any rate of interest, "provided, however, that no greater rate of interest than six per centum per annum shall be recovered in any action, except when the agreement to pay such greater rate of interest is in writing."

When a written agreement is made, as authorized by the statute, to pay a greater rate of interest yearly than six per cent, the intention of the contract and the effect of the statute appear to us to be that the creditor shall receive the stipulated rate of interest so long as the debtor has the use of the principal; and that, in an action upon the contract, the creditor shall recover interest at that rate, not merely until the time when the principal is agreed to be paid to him, but until it is actually paid, or his claim for principal and interest judicially established.

In *Brannon v. Hursell*, 112 Mass. 63, it was accordingly held, in an action upon a promissory note payable in four months, "with interest at ten per cent," that interest was to be computed at that rate, not merely to the maturity of the note, but to the time of the verdict; and upon reconsideration of the authorities there referred to, and examination of the numerous decisions cited at the argument of the present case, we see no reason to overrule or qualify the point adjudged, although the statement in the opinion that "the plaintiff recovers interest, both before and after the note matures, by virtue of the contract, as an incident or part of the debt," might well be modified so as to say that the interest after the breach of the contract, though not strictly recoverable as part of the debt, but rather as damages, is ordinarily to be measured, according to the intention manifested by the contract, by the standard thereby established.

In *Price v. Great Western Railway*, 16 M. & W. 244, 248, Baron PARKE said that the reason why, under a mortgage deed whereby interest is payable up to a certain day, interest beyond that day might be recovered as damages, was "because the deed shows the intention of the parties that it should be a debt bearing interest;"

Union Institution for Savings v. City of Boston.

and added, "The jury give it as damages for the detention of the debt. It is not recoverable as interest on the contract itself."

In *Morgan v. Jones*, 8 Exch. 620, the owners of a vessel mortgaged it as security for a debt, with a proviso for redemption on payment of the principal and interest at the rate of ten per cent in six months, but without any provision for payment of interest after that time. The principal not being paid then, it was held by Chief Baron POLLOCK and Barons PARKE, PLATT and MARTIN that the mortgagee was entitled to interest at the same rate until payment; and Baron PARKE said: "It was a sale of a chattel, redeemable on a certain day; then, if the mortgagors do not avail themselves of that provision, the same rate of interest continues payable. It is exactly like a mortgage of real estate, where the mortgagee becomes the legal owner."

So in *Keene v. Keene*, 13 C. B. (N. S.) 44, an action by an indorsee against the drawer of a bill of exchange for £200, payable in twelve months, with interest at the rate of ten per cent per annum, was referred to a master, who allowed ten per cent interest after, as well as before, the maturity of the bill. The defendant moved to recommit the case to the master; and argued that there was no implied contract on the part of the drawer, upon the acceptor's default, to pay more than the ordinary interest of five per cent; that the acceptor could only be liable to interest at five per cent after maturity of the bill; and that the bill was in effect a bill for £220. But the court overruled the motion. Mr. Justice WILLES said: "Until the maturity of the bill, the interest is a debt; after its maturity, the interest is given as damages at the discretion of the jury. Here a jury might adopt as the measure of damages the rate of interest which the parties themselves had fixed; and the master is substituted for a jury." Chief Justice COCKBURN said: "I see no ground for referring this case back to the master, as prayed. He has, as he well might, given in the shape of damages the rate of interest the parties themselves had contracted for. I think he has done quite right." Mr. Justice CROWDER said: "I am of the same opinion. The master would, I think, have acted very unreasonably if he had not assessed the damages by the rate which the parties had stipulated as to the value of the money." And Mr. Justice WILLIAMS concurred.

In *Cook v. Fowler*, L. R., 7 H. L. 27, a debtor, on May 2, 1864, gave a warrant of attorney to a creditor "to secure the payment of

Union Institution for Savings v. City of Boston.

the sum of £1,330, with interest thereon at and after the rate of £5 per cent per month, on the 2d of June next, judgment to be entered up forthwith; and in case of default in payment of the said sum of £1,330 and interest thereon on the day aforesaid, execution or executions and other processes may then issue for the said sum of £1,330 with interest, together with costs of entering up judgment, etc., etc., and all other incidental expenses whatever." The debtor died before the 2d of June, and no judgment was entered up. The creditor, who also held mortgages on lands of his debtor, concealed his warrant of attorney for three years, and then set it up in answer to a bill of the executors against him for an account, and more than a year later first claimed to be allowed interest for the whole time at the rate of sixty per cent a year. It was held by the House of Lords, affirming a decree of Vice Chancellor STUART, that he was entitled after the 2d of June, 1864, to ordinary interest only; and this upon two grounds: 1st. That the warrant of attorney and the defeasance did not create a contract, but only an authority to enter up judgment on June 2, 1864, and a stipulation that execution might then issue. 2d. The extraordinary and excessive rate of interest, and the conduct of the creditor.

Although Lord CHELMSFORD (apparently overlooking the cases of *Morgan v. Jones*, and *Keene v. Keene*, above cited) said, "There is no authority that I can find to support the argument of the counsel for the appellant, that when a security for money payable at a certain day stipulates for the allowance of a certain rate of interest up to the day fixed for payment, interest at the same rate is implied to be payable afterward;" L. R., 7 H. L. 35; Lord Chancellor CAIRNS and Lord SELBORNE were clearly of a different opinion. The lord chancellor said, that according to the well-known principle, which had been referred to in many cases, "any claim, in the nature of a claim for interest after the day up to which interest was stipulated for, would be a claim really, not for a stipulated sum and interest, but for damages, and then it would be for the tribunal before which that claim was asserted to consider the position of the claimant, and the sum which properly, and under all the circumstances, should be awarded for damages. No doubt, *prima facie*, the rate of interest stipulated for up to the time certain might be taken, and generally would be taken, as the measure of interest; but that would not be conclusive. It would be for the tribunal to look at all the circumstances of the case, and

Union Institution for Savings v. City of Boston.

to decide what was the proper sum to be awarded by way of damages." pp. 32, 33. And Lord SELBORNE said : " Although in cases of this class interest for the delay of payment *post diem* ought to be given, it is on the principle, not of implied contract, but of damages for a breach of contract. The rate of interest to which the parties have agreed during the term of their contract may well be adopted in an ordinary case of this kind by a court or jury, as a proper measure of damages for the subsequent delay ; but that is because ordinarily a reasonable and usual rate of interest, which it may be presumed would have been the same whatever might be the duration of the loan, has been agreed to." pp. 37, 38.

It a later case, Lord Justice AMPHLETT considered it to be clearly established by the previous decisions that in the case of a mercantile security it is to be supposed that the parties intended interest to run on at the old rate if the money was not paid at the date : and so, in the redemption of mortgages, although the day for payment has passed and there is no provision with the creditor for payment of interest after that day, the court will assume that interest is payable after the day at the same rate as before ; and that although what has to be paid may technically be called damages, they are damages of a peculiar kind, for it would not be left to a jury to regulate the amount ; but the jury would be directed, as a matter of law, to find damages of the same amount as the interest which would have been payable if the promise had extended over the period. *Gordillo v. Weguelin*, 5 Ch. D. 287, 303.

In the very recent case of *In re Roberts*, 14 Ch. Div. 39, where by a mortgage deed, reciting an agreement for a loan of £5,000 at the rate of ten per cent per annum, the mortgagor covenanted to pay in six months the sum of £250, being half a year's interest on the £5,000, and in twelve months the sum of £250, being a further half-year's interest and also the principal sum of £5,000, making together £5,250, and made no covenant for the payment of interest in the event of the principal remaining unpaid after the day named for its repayment, but actually paid interest at the rate of ten per cent for three years afterward, and then died ; and after a decree for administration of his estate, the mortgagee proved as a creditor for principal and interest ; it was indeed held by Sir George JESSEL, M. R., and Lords Justices BRETT and COTTON, that he was entitled, in such a suit, to interest at the rate of five per cent only. But no decision upon the point appears to have been brought to the notice

Union Institution for Savings v. City of Boston.

of the court, except *Cook v. Fowler*, above cited ; and the case was decided upon the assumption that there was no precedent for giving more than the ordinary rate of interest by way of damages. Under the circumstances, the case cannot be considered, by a court not bound by it as authority, to outweigh the decisions of Chief Baron POLLOCK and Baron PARKE, of Chief Justice COCKBURN and Mr. Justice WILLES, and their associates, and the opinions of Lord CAIRNS and Lord SELBORNE, above quoted. It may also be observed that the Master of the Rolls said (without giving any reason why the agreement of the parties should be allowed a greater effect by way of protection of the party who had broken his contract, than for the benefit of the party who by such breach had been deprived of the use of his money) that if the rate of interest named by the parties were below the ordinary rate, it would be the proper measure of damages ; and that Lord Justice COTTON took the precaution to remark that the court was not deciding what rate of interest should be allowed in a suit for redemption.

Before the decision in *Brannon v. Hursell*, the rule there declared had been established in Indiana, California, Texas, New Jersey, Illinois, Wisconsin, Iowa, Nevada and Tennessee. *Kilgore v. Powers*, 5 Blackf. 22 ; *Kohler v. Smith*, 2 Cal. 597 ; *Guy v. Franklin*, 5 id. 416 ; *Corcoran v. Doll*, 32 id. 82 ; *Hopkins v. Crittenden*, 10 Tex. 189 ; *Wilson v. Marsh*, 2 Beas. 289 ; *Phinney v. Baldwin*, 16 Ill. 108 ; *Etnyre v. McDaniel*, 28 id. 201 ; *Heartt v. Rhodes*, 66 id. 351 ; *Spencer v. Mazfield*, 16 Wis. 541 ; *Pruyn v. Milwaukee*, 18 id. 367 ; *Hand v. Armstrong*, 18 Iowa, 324 ; *Thompson v. Pickel*, 20 id. 490 ; *McLane v. Abrams*, 2 Nev. 199 ; *Overton v. Bolton*, 9 Heisk. 762 ; s. c., 24 Am. Rep. 367. It has since been affirmed by decisions of the highest courts of Ohio, Michigan and Virginia. *Monnett v. Sturges*, 25 Ohio St. 384 ; *Marietta Iron Works v. Lottimer*, id. 621 ; *Warner v. Juif*, 38 Mich. 662 ; *Cecil v. Hicks*, 29 Gratt. 1 ; s. c., 26 Am. Rep. 391. And it has been acted on by Judge LOWELL in the Circuit Court of the United States for this district ; *Burgess v. Southbridge Savings Bank*, 2 Fed. Rep. 500.

In Connecticut, the law seems formerly to have been considered as settled in accordance with these decisions ; and although some recent *dicta* have a tendency to explain away the grounds assigned in the earlier judgments, there is no adjudication to the contrary. *Beckwith v. Hartford, Providence & Fishkill Railroad*, 29 Conn. 268 ; *Adams v. Way*, 33 id. 419 ; *Hubbard v. Callahan*, 42 id. 524,

Union Institution for Savings v. City of Boston.

537; s. c., 19 Am. Rep. 564; *Suffield Ecclesiastical Society v. Loomis*, 42 Conn. 570, 575; *Seymour v. Continental Ins. Co.*, 44 id. 300; s. c., 26 Am. Rep. 469.

The earlier decisions in New York support the same rule, both as to mortgages and as to ordinary debts. *Miller v. Burroughs*, 4 Johns. Ch. 436; *Van Beuren v. Van Gaasbeck*, 4 Cow. 496. But in the light of later cases the question may perhaps be considered an open one in that State. See *Bell v. Mayor of New York*, 10 Pai. 49; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Ritter v. Phillips*, 53 id. 586. It may be doubted however whether the cases of *Macomber v. Dunham*, 8 Wend. 550, and *United States Bank v. Chapin*, 9 id. 471, sometimes referred to in discussions of the subject, are really applicable. In one of them, the decision was that a corporation, authorized by its charter to charge interest for a full month on loans for more than fifteen days and less than a month, could not demand interest at the same rate during subsequent months while such a loan remained unpaid. In the other, the only point decided was, that a bank, limited by statute to six per cent interest on all discounts, was not thereby prevented from recovering the legal rate of seven per cent as damages after breach of the contract by the other party. Each case turned, not upon the terms of a contract, but upon the effect of a peculiar statute, the scope of which was clearly defined and limited. And in neither of them is there any intimation of an intention to overrule the decision of Chancellor KENT in *Miller v. Burroughs*, or that of Chief Justice SAVAGE and Justices SUTHERLAND and WOODWORTH in *Van Beuren v. Van Gaasbeck*. The case of *Kitchen v. Mobile Bank*, 14 Ala 233, is like *United States Bank v. Chapin*.

In *Ashuelot Railroad v. Elliot*, 57 N. H. 397, 437, 439, cited for the defendant Farnsworth, the point decided was, that upon bonds bearing interest at the rate of six per cent annually payable half-yearly, interest, after maturity, and payment of all the coupons, should be computed in equity at the rate of six per cent, without annual or other rests; in short, that compound interest should not be allowed in a suit on the principal debt. That decision, in effect overruling *Peirce v. Rowe*, 1 N. H. 179, accords with the general current of authority, in equity as well as at law. *Ferry v. Ferry*, 2 Cush. 92; *Connecticut v. Jackson*, 1 Johns. Ch. 13; 7 Am. Dec. 471; *Van Benschooten v. Lawson*, 6 id. 313; 10 Am. Dec. 333; *Mowry v. Bishop*, 5 Pai. 98; *Sparks v. Garrigues*, 1 Binn. 152, 165;

Union Institution for Savings v. City of Boston.

Stokely v. Thompson, 34 Penn. St. 210 ; *Doe v. Warren*, 7 Greenl 48 ; *Parkhurst v. Cummings*, 56 Me. 155. It does not affect the question before us.

The leading cases in support of the defendant's view are *Ludwick v. Huntzinger*, 5 W. & S. 51, and *Brewster v. Wakefield*, 22 How. 118.

In *Ludwick v. Huntzinger*, it was held by the Supreme Court of Pennsylvania, that on a bond for the payment of money in twenty-one months, with three per cent interest from date, the obligee was entitled to recover three per cent interest until the time fixed for payment, and six per cent afterward.

In *Brewster v. Wakefield*, it was held by the Supreme Court of the United States (reversing the judgment of the Supreme Court of the Territory of Minnesota in 1 Minn. 352), that upon a mortgage to secure notes which respectively stipulated for the payment of interest at the yearly rates of twenty-four and twenty-five per cent, where the rate fixed by statute, in the absence of express agreement, was seven per cent, interest at the rate of seven per cent only could be recovered after the maturity of the notes. Chief Justice TANEY, in delivering judgment, said : "The contract being entirely silent as to interest if the notes should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision in the contract. And, in this view of the subject, we think the Territorial courts committed an error in allowing, after the notes fell due, a higher rate of interest than that established by law where there was no contract to regulate it." He then referred to the cases of *Macomber v. Dunham*, *United States Bank v. Chapin*, *Ludwick v. Huntzinger*, above stated, and added : "Nor is there any thing in the character of this contract that should induce the court, by supposed intendment of the parties or doubtful inferences, to extend the stipulation for interest beyond the time specified in the written contract. The law of Minnesota has fixed seven per cent per annum as a reasonable and fair compensation for the use of money; and where a party desires to exact from the necessities of a borrower more than three times as much as the legislature deems reasonable and just, he must take care that the contract is so written, in plain and unambiguous terms ; for with such a claim, he must stand upon his bond."

The same rule appears to have been followed by the Supreme Court in a case from the Territory of Utah. *Burnhiss v. Firman*,

Union Institution for Savings v. City of Boston.

22 Wall. 170. And it has since been adopted as a general rule by the courts of Kansas, Minnesota, South Carolina, Rhode Island, Kentucky, Arkansas and Maine. *Robinson v. Kinney*, 2 Kans. 184; *Lash v. Lambert*, 15 Minn. 416; s. c., 2 Am. Rep. 142; *Moreland v. Lawrence*, 23 Minn. 84; *Langston v. South Carolina Railroad*, 2 So. Car. (N. S.) 248; *Pearce v. Hennessy*, 10 R. I. 223; *Rilling v. Thompson*, 12 Bush, 310; *Newton v. Kennerly*, 31 Ark. 626; *Duran v. Ayer*, 67 Me. 145; *Eaton v. Boissonnault*, 67 id. 540; s. c., 24 Am. Rep. 52.

But the later judgments of the Supreme Court exhibit a difference of opinion as to the general rule, though not of adjudication in the particular cases before the court.

In *Cromwell v. County of Sac*, 96 U. S. 51, which arose in the Circuit Court of the United States for the District of Iowa upon a bond given in Iowa and stipulating for the payment of ten per cent interest, Mr. Justice FIELD, delivering the judgment of the Supreme Court, treated the decision in *Brewster v. Wakefield* as based upon the exorbitant rate of the interest, and after referring to *Brannon v. Hursell* and many of the other American cases above cited, said, "The preponderance of opinion is in favor of the doctrine, that the stipulated rate of interest attends the contract until it is merged in the judgment." And it was held, reversing in this respect the judgment of the Circuit Court, that the construction given by the Supreme Court of Iowa to the statute of that State was conclusive, and that interest must be computed at the rate expressed in the contract to the time of judgment.

On the other hand, in the case of *Holden v. Trust Co.*, 100 U. S. 72, which arose in the District of Columbia under a statute like ours except in not allowing the parties to stipulate for interest at a greater rate than ten per cent, it was held, upon a bill in equity, that on a note made payable in four years, with interest at the rate of ten per cent payable semi-annually, and secured by a conveyance of real estate in trust, interest from the maturity of the note should be computed at the ordinary rate of six per cent only; and Mr. Justice SWAYNE, in delivering judgment, said: "The rule heretofore applied by this court, under the circumstances of this case, has been to give the contract rate up to the maturity of the contract, and thereafter the rate prescribed for cases where the parties themselves have fixed no rate. *Brewster v. Wakefield*, 22 How 118; *Burnhisel v. Firman*, 22 Wall. 170. Where a different rule

has been established, it governs, of course, in that locality. The question is always one of local law. This subject was fully examined in the recent case in this court of *Cromwell v. County of Sac*, 94 U. S. 351. [The reference intended is evidently 96 U. S. 51, above cited.] We need not go over the ground again. Here the agreement of the parties extends no further than to the time fixed for the payment of the principal. As to every thing beyond that, it is silent. If payment be not made when the money becomes due, there is a breach of the contract, and the creditor is entitled to damages. Where none has been agreed upon, the law fixes the amount according to the standard applied in all such cases. It is the legal rate of interest where the parties have agreed upon none. If the parties meant that the contract rate should continue, it would have been easy to say so. In the absence of a stipulation, such an intendment cannot be inferred."

The law upon this subject, as declared by the Supreme Court of the United States, would appear to be, that in the District of Columbia or in a Territory of the United States, the rate of interest agreed by the parties in the usual form is recoverable to the stipulated time of payment only, and the statute rate of interest afterward; but that cases arising in any State must be governed by the local law as expounded by its courts.

Two observations may be made on the judgments which are opposed to the decision in *Brannon v. Hursell*. 1st. They admit that the intent of the parties, if expressed with sufficient clearness in their contract, will govern the rate of interest to the time of judgment. *Brewster v. Wakefield* and *Holden v. Trust Co.*, above cited; *Pearce v. Hennessy*, 10 R. I. 227; *Capen v. Crowell*, 66 Me. 282; *Paine v. Caswell*, 68 id. 80; s. c., 28 Am. Rep. 21; *Gray v. Briscoe*, 6 Bush, 687; *Young v. Thompson*, 2 Kans. 83. 2d. They assume in opposition to the leading English cases, that if interest after the maturity of the contract is to be recovered, not as interest, but as damages, it must necessarily be estimated at the ordinary rate.

The question being, as is clearly recognized in the two most recent judgments of the Supreme Court of the United States, one of local law, in deciding which this court is not bound by the opinion of any other tribunal, we are constrained, with great respect for those who take a different view of the subject, to say that the rule established in this Commonwealth by the adjudication in *Brannon*

Union Institution for Savings v. City of Boston.

v. Hursell appears to us to best accord with the purpose of the legislature, with the apparent intention of the parties, with the usage and understanding of men of business, with the weight of legal reasoning and authority, and with the principles of equity that govern the enforcement and redemption of mortgages.

In the case before us, each of the mortgages to the plaintiff, duly recorded, and subject to which the defendant Farnsworth took his title, makes the payment by the mortgagors of the principal debt in five years, "with interest semi-annually at the rate of seven and a half per cent per annum," a condition upon which the mortgage, and "one note of even date herewith" whereby the mortgagors "promise to pay the said corporation or order the said sum and interest at the times aforesaid," shall be void. Each of the notes thus referred to does in the most explicit terms require interest to "be paid semi-annually at the rate of seven and a half per centum per annum during said term, and for such further time as said principal sum or any part thereof shall remain unpaid;" and the description of the debt and interest in the mortgage might be held sufficient to give any one taking the land subject to the mortgage such information that he could not redeem the land without paying interest according to the stipulation in the notes, even if by that stipulation such interest was to be computed for a longer period than would appear upon the face of the mortgage taken by itself. *Richards v. Holmes*, 18 How. 143; *Ackens v. Winston*, 7 C. E. Green, 444. But we do not decide that point, because we are of opinion, on the grounds already stated, that the legal effect of the provision of the mortgage is the same as that of the fuller language of the note.

The stipulated rate is only one-fifth of one per cent a year higher than the interest payable upon some notes of the United States, and there is no pretense that it is unconscionable or unreasonable. The claim upon the money received by Farnsworth from the city is no less than it would have been against the land for which that money is a substitute. *Farnsworth v. Boston*, 126 Mass. 1. As he might at any time have stopped the running of the interest after the maturity of the notes by performing his obligation and paying the mortgage debt, neither the lapse of time nor the other circumstances of the case afford any reason why the plaintiff should not recover interest at the stipulated rate to the time of the decree.

Decree affirmed.

DICKASON V. WILLIAMS.

(129 Mass. 188.)

Mortgage — assumption — merger.

A mortgagor conveyed the mortgaged premises, the grantee assuming the mortgage. The grantee afterward conveyed the premises to the mortgagee, the deed reciting that the conveyance was subject to the mortgage. *Held*, that the mortgage was merged, and there could be no recovery on the mortgage note.

ACTION on promissory note. The opinion states the facts. The plaintiff had judgment below.

H. N. Shepard, for plaintiff.

J. A. Maxwell, for defendant.

AMES, J. It appears from the report that the note in suit, which was for \$3,000, was given by the defendant to the plaintiff, and was secured by a mortgage upon certain premises in Henchman street in Boston. The note and the mortgage were of the same date, and there is no intimation of any other mortgage on the property. Some years afterward, and before the note became due, the defendant conveyed the property to John and Bridget Wills, subject to the mortgage, it being recited in the deed that the grantees assumed and agreed to pay the mortgage. The effect of this transaction was to impose upon the grantees, by their acceptance of such a deed, a duty to make that payment, upon which the law would imply a promise to do so. *Pike v. Brown*, 7 Cush. 133; *Braman v. Dowse*, 12 id. 227; *Jewett v. Draper*, 6 Allen, 434. Subsequently, and after the maturity of the note, these grantees, in consideration of \$3,500, conveyed the mortgaged property to the plaintiff subject to the mortgage of \$3,000, "which mortgage forms part of the above consideration." In other words, the plaintiff repurchased the property, or took it back, and part of the price of this repurchase was the debt or claim which she at the time held against the same property. The plaintiff accepted a deed, which on its face imported that the amount due to her upon this note, which John and Bridget Wills had become liable to pay, was

Whiting v. Massachusetts Insurance Company.

reckoned and included in the consideration for that very deed. This mode of dealing operated as a payment of the mortgage debt, by a party legally bound to pay it, to a party entitled to receive it. Upon these facts, the same person who held the mortgage has become the holder of the equity of redemption, and there being no intervening incumbrance or outstanding interest in any other person, the mortgage is merged and the debt extinguished. 2 Washb. Real Prop. (4th ed.) 193, and cases there cited.

Verdict set aside, and new trial ordered.

WHITING V. MASSACHUSETTS INSURANCE COMPANY.

(129 Mass. 240.)

Insurance — payment of premium by third person.

Where payment is made a condition precedent, the first payment of a life insurance premium by a third person, without the knowledge of the insured, although with his money, is of no effect. (*See note, p. 820.*)

ACTION on life insurance policy. The opinion states the facts. The plaintiff had judgment below.

G. Wells, for defendant.

G. M. Stearns, for plaintiff.

COLT, J. It is expressly provided in the policy of life insurance upon which this action is brought, that it "shall not take effect until the advance premium hereon shall have been paid during the life-time of the person whose life is hereby insured."

It appeared at the trial, that in February, Henry L. Fairfield, the plaintiff's intestate, made application for insurance in the defendant company; and that in the early part of May following, the policy in suit was left at Fairfield's place of business, by an agent of the company, who by letter requested payment of the premium "if the policy was correct and satisfactory." This request was repeated by letter dated May 21, addressed to Fairfield, who was then at home, having arrived there in ill health on the 18th of the same

Whiting v. Massachusetts Insurance Company.

month. He died of this illness on May 27. The letter of the 21st was opened by his sister, who, without communication with or direction from him, caused the advance premium to be paid to the company, by a check signed by a member of the firm in which Fairfield was a partner. Fairfield died without knowledge of this payment.

Upon this state of facts, it is plain that no contract of insurance existed between the parties at the time of the death of the plaintiff's intestate. The possession of the policy, without a waiver, on the part of the company, of the condition upon the performance of which it was to take effect, does not, on the facts disclosed, show a delivery of it in completion of the contract, or furnish any evidence that the minds of the parties had met. It is not enough that the form of the policy had been approved, for it was still optional with Fairfield whether he would by payment make it a binding contract. If he declined or neglected to pay, the company would have no claim for the premium against him, or against his estate, because the risk never attached. A payment by a stranger, made without the knowledge or consent of the assured, though made with his money, would not bind him or the company; and the money, so wrongfully appropriated, could be recovered back by him or by his administrator. *Hoyt v. Mutual Benefit Ins. Co.*, 98 Mass. 539; *Markey v. Mutual Benefit Ins. Co.*, 103 id. 78; *Badger v. American Ins. Co.*, 103 id. 244; s. c., 4 Am. Rep. 547; *Thayer v. Middlesex Ins. Co.*, 10 Pick. 326; *Piedmont & Arlington Ins. Co. v. Ewing*, 92 U. S. 377.

After the death of Fairfield, the administrator of his estate, and the widow, to whom the policy was made payable, joined in the proofs of loss, and the administrator, for the benefit of the widow, brought this action against the company. But these proceedings do not amount to such ratification of the unauthorized payment by the sister as will give validity to the policy. The difficulty is, that there was no contract existing at the time of the death to be ratified. The payment of the premium was not the payment by another of a debt due from the intestate, which the administrator, without affecting the rights of the company, would have power to ratify; and to say that the administrator may now do it, so as to bind the company, would be to say that a policy of life insurance may be made to take effect as a contract by an act of ratification by the administrator after the death of the person whose life is thereby in-

Whiting v. Massachusetts Insurance Company.

ured; or as was said by Mr. Justice MILLER in *Piedmont & Arlington Ins. Co. v. Ewing*, above cited, "to affirm that one party to a negotiation can delay his consent to the terms of the contract until the changes of fortune enable him to reap all the benefits, and throw all the losses on the other side, and then, for the first time, do what was necessary on his part to make the contract obligatory."

It is laid down, in general rules governing the relation of principal and agent, that no authorized act of the latter can be made valid by subsequent ratification to the prejudice of third persons without their consent; and that no ratification is valid unless the principal at the time of ratifying the act has power to confer the authority for such act. *Sturtevant v. Robinson*, 18 Pick. 175; *Bird v. Brown*, 4 Exch. 786; *McCracken v. San Francisco*, 16 Cal. 591, 624; Story on Agency, §§ 245, 246.

It is contended that there is some authority for the proposition, that the payment of a renewal premium by a stranger to the contract, after it becomes due, will be sufficient to prevent the lapsing of a policy on the life of one who dies after it becomes due and before it is paid, although the policy contains the usual condition requiring its payment in order to continue the contract in force. But the case of *Howell v. Knickerbocker Ins. Co.*, 44 N. Y. 276, s. c., 4 Am. Rep. 675, cited by the plaintiff, was decided expressly on the ground that there had been a waiver by the company of a prompt payment of the annual premium, so that the contract of insurance was in force at the time of the death. See also *Pritchard v. Merchants & Tradesmen's Assurance Society*, 3 C. B. (N. S.) 622. Whatever may be the law as applicable to the payments of annual premiums under a policy which has once attached, we are of opinion that the contract cannot be originally created without the consent of the assured.

Under the law of marine insurance, as laid down in the cases cited by the plaintiff, it is said that when a vessel is insured by a part-owner for the other part-owners, without their previous authority, the latter may ratify the act, after knowledge of the loss. But that is because in those cases a valid contract of insurance is at once created by the part-owner by payment of the premium, or by a promise to pay upon which the policy is issued.

The judge at the trial refused to rule as requested by the defendant, that the payment of the premium by the sister, Miss Whiting, would not be a payment by Fairfield which would make the defend-

Whiting v. Massachusetts Insurance Company.

ant liable on the policy; and for this refusal the entry must be, exceptions sustained.

Exceptions sustained.

NOTE BY THE REPORTER.—Somewhat resembling this case is *Giddings v. Life Insurance Co.*, 103 U. S. 108. The head-note is as follows: "The form of policy of an insurance company contains a provision that the policy 'shall not take effect and become binding on the company till the premium be actually paid, during the life-time of the person whose life is assured.' The plaintiff applied to the company for an insurance. The company, after consideration, made out the policy and sent it to their local agents three weeks after the date of the plaintiff's application. One week after his application the plaintiff was taken sick, and a month after the application he died. The policy was not called for during his life, but two months after his death his personal representatives tendered the premium to the local agents, and on their refusal to deliver the policy, brought suit: *Held*—1. That the contract of insurance had not been consummated, the minds of the contracting parties not having met, and the payment of the premium being a condition precedent 2. That his personal representatives could not act for him to complete such a contract by a tender, etc. 3. That equity could give no relief, the payment of the premium being a condition precedent, and not having been performed."

The court said: "It was competent for the company to pause as long as they might deem proper, and finally to accept or reject the application, as they might choose to do. If they elected to contract they had the right to prescribe the terms, and it was for the other party to assent or reject them. His unbroken silence, as would have been such silence by the company after receiving the application, was necessarily negation. Neither party in such case would have been bound in anywise to the other, because there would have been wanting the mutual assent of the minds of the parties, which is vital in all cases to the creation of a contract obligation. What was done, without something further, could have no more weight or efficacy, in the view of the law, than an unexpressed thought or any other unexecuted intention.

"The company prepared the draft of a contract which they were willing to execute. Among its stipulations was one that assurers should not be bound by the instrument until the premium was paid, in the life-time of the assured, and the policy was countersigned by the authorized agent of the company. This was a condition precedent to the liability of the appellees. It was necessary to their safety. There was nothing in it unconscionable or oppressive, and the company had a clear legal right to make it.

"Where there is a condition subsequent, and it is broken, relief may be given upon equitable terms; but where it is precedent, and neither fulfilled nor waived, no right or title vests, and equity can do nothing for the party in default. *Davis v. Gray*, 16 Wall. 221.

"Here there was clearly no performance by the applicant, and it is equally clear that hence there was no contract or obligation whatsoever on the part of the company.

"It was the business of the applicant, if after sending forward his application, he continued to desire a policy, to keep up the proper communication with Dean & Payne, and during his life-time to avail himself of the offer which the company had made. The proposition of the company expired with his life. After his death his legal representatives could not act vicariously for him. To allow them to enforce such a claim would be contrary to the plainest principles of both law and equity. If authorities in so plain a case are needed, it is sufficient to refer to *Ins. Co. v. Young's Administrator*, 23 Wall. 164, and *Piedmont Life Ins. Co. v. Ewing*, 92 U. S., 380.

What the consequence would have been if, after the applicant was stricken with his mortal disease, the premium had been paid and the policy delivered, the company being ignorant of his changed condition, is a point which we do not find it necessary to consider."

ROSS v. ROSS.

ROSS v. ROSS.

(129 Mass. 243.)

Adoption — comity.

A child having been legally adopted and thus entitled to inherit real estate in another State, having with its adopting father become resident in Massachusetts, where similar laws of adoption prevail, may inherit real estate in Massachusetts, although the wife has given no formal consent to the adoption, as required in the latter State. (*See note, p. 343.*)

W RIT of entry for land. The opinion states the point. The defendant had judgment below.

N. A. Leonard & G. Wells, for the demandant.

J. M. Ross, pro se.

GRAY, C. J. This case presents for adjudication the question which it was attempted to raise in *Ross v. Ross*, 123 Mass. 212, namely, whether a child adopted, with the sanction of a judicial decree, and with the consent of his father, by another person, in a State where the parties at the time have their domicile, under statutes substantially similar to our own, and which, like ours, give a child so adopted the same rights of succession and inheritance as legitimate offspring in the estate of the person adopting him, is entitled, after the adopting parent and the adopted child have removed their domicile into this Commonwealth, to inherit the real estate of such parent in this Commonwealth upon his dying here intestate.

The question how far a child, adopted according to law in the State of the domicile, can inherit lands in another State, was mentioned by Lord BROUGHAM in *Doe v. Vardill*, 7 Cl. & Fin. 895, 898, and by Chief Justice LOWRIE in *Smith v. Derr*, 34 Penn. St. 126, 128; but so far as we are informed, has never been adjudged. It must therefore be determined upon a consideration of general principles of jurisprudence, and of the judicial application of those principles in analogous cases.

As a general rule, when no rights of creditors intervene, the succession and disposition of personal property are regulated by the law of the owner's domicile. It is often said, as in *Cutter v.*

Davenport, 1 Pick. 81, 86, cited by the tenant, to be a settled principle, that "the title to and the disposition of real estate must be exclusively regulated by the law of the place in which it is situated." But so general a statement, without explanation, is liable to mislead. The question in that case was of the validity of an assignment of a mortgage of real estate; and there is no doubt that by our law the validity, as well as the form, of any instrument of transfer of real estate, whether a deed or a will, is to be determined by the *lex rei sitæ*; *Goddard v. Sawyer*, 9 Allen, 78; *Sedgwick v. Laflin*, 10 id. 430, 433; *United States v. Crosby*, 7 Cr. 115; *Clark v. Graham*, 6 Wheat. 577; *Kerr v. Moon*, 9 id. 565; *McCormick v. Sullivan*, 10 id. 192.

It is a general principle, that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile; and that this status and capacity are to be recognized and upheld in every other State, so far as they are not inconsistent with its own laws and policy. Subject to this limitation, upon the death of any man, the status of those who claim succession or inheritance in his estate is to be ascertained by the law under which that status was acquired; his personal property is indeed to be distributed according to the law of his domicile at the time of his death, and his real estate descends according to the law of the place in which it is situated; but in either case, it is according to those provisions of that law which regulate the succession or the inheritance of persons having such a status.

The capacity or qualification to inherit or succeed to property, which is an incident of the status or condition, requiring no action to give it effect, is to be distinguished from the capacity or competency to enter into contracts that confer rights upon others. A capacity to take and have differs from a capacity to do and contract; in short, a capacity of holding from a capacity to act. Generally speaking, the validity of a personal contract, even as regards the capacity of the party to make it, as in the case of a married woman or an infant, is to be determined by the law of the State in which it is made. *Milliken v. Pratt*, 125 Mass. 374, and authorities cited; s. c., 28 Am. Rep. 241; *Polydore v. Prince*, 1 Ware, 402, 408-413; *Bell v. Packard*, 69 Me. 105; s. c., 31 Am. Rep. 251; *Bond v. Cummings*, 70 Me. 125; *Wright v. Remington*, 12 Vroom, 48; s. c., 33

Am. Rep. 180 ; Sir WILLIAM SCOTT in *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 54, 61 ; Lord BROUGHAM in *Warrender v. Warrender*, 2 Cl. & Fin. 488, 544 ; s. c., 9 Bligh N. R. 89, 120 ; 2 Sh. & Macl. 154, 214 ; *Simonin v. Mallac*, 2 Sw. & Tr. 67, 77 ; *Sottomayer v. De Barros*, 5 P. D. 94, 100. And the validity of any transfer of real estate by act of the owner, whether *inter vivos* or by will, is to be determined, even as regards the capacity of the grantor or testator, by the law of the State in which the land is situated. Story Confl., §§ 431, 474. But the status or condition of any person, with the inherent capacity of succession or inheritance, is to be ascertained by the law of the domicile which creates the status, at least when the status is one which may exist under the laws of the State in which it is called in question, and when there is nothing in those laws to prohibit giving full effect to the status and capacity acquired in the State of the domicile.

A person, for instance, who has the status of child of another person in the country of his domicile, has the same status here, and as such takes such share of the father's personal property as the law of the domicile gives him, and such share of his real estate here as a child takes by the laws of this Commonwealth, unless excluded by some positive rule of our law. Inheritance is governed by the *lex rei sitæ*; but legitimacy is to be ascertained by the *lex domicilii*. If a man domiciled in England has two legitimate sons there, and dies intestate, owning land in this Commonwealth, both sons have the status of legitimate children here ; but by virtue of our statute of descents, the land descends to them equally, and not to the eldest son alone, as by the law of England.

If a marriage (in the proper sense of the term, not including Mormon or other polygamous marriages ; *Hyde v. Hyde*, L. R., 1 P. & D. 130) is celebrated in one State, according to the form prescribed by its laws, between persons domiciled there, and competent to intermarry, it is universally admitted that the woman must be recognized everywhere as the lawful wife of the man, and entitled as such upon his death to such dower in his lands as the law of the State in which they are situated allows to a widow ; although it is this law, and not the law of the domicile, which fixes the proportion that she shall take. *Ilderton v. Ilderton*, 2 H. Bl. 145 ; *Doe v. Vardill*, 2 Cl. & Fin. 571, 575, 576 ; s. c., 9 Bligh N. R. 32, 47, 48 ; *Potter v. Titcomb*, 22 Me. 300 ; *Lamar v. Scott*, 3 Strobb. 562 ; *Jones v. Gerock*, 6 Jones Eq. 190 ; Story Confl., §§ 159, 454.

Our law goes beyond this in recognizing the validity of foreign marriages, and holds, that the relation of husband and wife being a status based upon the contract of the parties, and recognized by all Christian nations, the validity of that contract, if not polygamous, nor incestuous according to the general opinion of Christendom, is governed, even as regards the competency of the contracting parties, by the law of the place of contract; that this status, once legally established, should be recognized everywhere as fully as if created by the law of the domicile; and therefore that any such marriage, valid by the law of the place where it is contracted, is, even if contracted between persons domiciled in this Commonwealth and incompetent to marry here under our laws (except so far as the legislature has clearly enacted that such marriages out of the Commonwealth shall be deemed void here), valid here to all intents and effects, civil or criminal, including the settlement of the wife and children, her right of dower and their legitimacy and capacity to inherit the father's real estate. PARSONS, C. J., in *Greenwood v. Curtis*, 6 Mass. 358, 377-379; 4 Am. Dec. 145; *Medway v. Needham*, 16 id. 157; *West Cambridge v. Lexington*, 1 Pick. 506; 11 Am. Dec. 231; *Putnam v. Putnam*, 8 id. 433; *Commonwealth v. Lane*, 113 Mass. 458; s. c., 18 Am. Rep. 509; *Bullock v. Bullock*, 122 Mass. 3; *Milliken v. Pratt*, 125 id. 380, 381; s. c., 28 Am. Rep. 241.

As to foreign divorces, it is well settled in this Commonwealth, that a decree of divorce rendered in another State, in which the legal domicile of the parties is at the time, and according to its laws, even for a cause which is not a ground of divorce by our laws, and although their marriage took place while they were domiciled in this Commonwealth, is valid here, and conclusive in a suit concerning the husband's interest or the wife's dower in lands in this Commonwealth. *Barber v. Root*, 10 Mass. 260; *Clark v. Clark*, 8 Cush. 385; *Hood v. Hood*, 11 Allen, 196; *Hood v. Hood*, 110 Mass. 463; *Burlen v. Shannon*, 115 id. 438; *Sewall v. Sewall*, 122 id. 156; s. c., 23 Am. Rep. 299. The provision of the existing statutes, affirming the validity of foreign divorces made no change in the law, but in the words of the commissioners upon whose advice it was first enacted, "is founded on the rule established by the comity of all civilized nations; and is proposed merely that no doubt should arise on a question so interesting and important as this may sometimes be." R. S., ch. 76, § 40, and note of commissioners; Gen. Sts., ch. 107, § 55. The leading case of *Barber v. Root*, above cited

ROSS v. ROSS.

arose and was determined before the enactment of this provision. And in England, since the establishment of a court vested with power to grant divorces from the bond of matrimony, the tendency of the judges is to recognize the validity of a foreign divorce between English persons married in England, but domiciled in good faith at the time of the divorce in the foreign State, at least for a cause which would be a cause of divorce in England. See Dicey on Domicile, 234-237, 353-355; *Harvey v. Farnie*, 5 P. D. 153.

Another class of cases requires more particular examination. By the rule of the common law, which is the law of England to this day, and formerly prevailed throughout the United States, a child not born in lawful matrimony is not deemed the child of his father, although the parents subsequently intermarry, but is indelibly a bastard. By the rule of the civil law, on the other hand, which has been adopted in Scotland, as well as in France, Germany, and other parts of Europe, and more recently in many States of the Union, such a child may become legitimate upon the subsequent marriage of his parents.

The leading case in Great Britain on this subject is *Shedden v. Patrick*, briefly reported in Morison's Dict. Dec. Foreign, Appx. I. No. 6, and more fully in 5 Paton, 194, which was decided by the House of Lords, on appeal from the Scotch Court of Session, in 1808, and in which a Scotchman, owning land in Scotland, became domiciled in New York, and there cohabited with an American woman, had a son by her, and afterward married her, and died there; and the son was held not entitled to inherit his land in Scotland. Two questions were argued: First. Whether the plaintiff, being by the law of the country where he was born, and where his parents were domiciled at the time of his birth and of their subsequent marriage, a bastard and not made legitimate by such marriage, could inherit as a legitimate son in Scotland, the law of which allows legitimation by subsequent matrimony. Second. Whether, being a bastard, and therefore *nullius filius* at the time of his birth in America, he was an alien and therefore incapable of inheriting land in Great Britain; the act of parliament of 4 Geo. II, ch. 21, making only those children, born out of the ligeance of the British crown, natural-born subjects, whose fathers were such subjects "at the time of the birth of such children respectively." The Court of Session decided the case upon the first ground. In the House of Lords, after full argument of both ques-

tions by Fletcher and Brougham for the appellant and by Romilly and Nolan for the respondent, Lord Chancellor ELDON, speaking for himself and Lord REDESDALE, said that "as it was not usual to state any reasons for affirming the judgment of the court below, he should merely observe that the decision in this case would not be a precedent for any other which was not precisely the same in all its circumstances," and thereupon moved that the judgment of the Court of Session should be affirmed, which was accordingly ordered. On a suit brought forty years afterward by the same plaintiff against the same defendant to set aside that judgment for fraud in procuring it, the House of Lords in 1854, without discussing the first point except so far as it bore upon the question whether there had been any fraudulent suppression of facts relating to the father's domicile, held that the plaintiff was an alien at the time of his birth, and could not be afterward naturalized except by act of Parliament. *Shedden v. Patrick*, 1 Macq. 535.

But the remark of Lord ELDON, above quoted, in moving judgment in the original case, and the statements made in subsequent cases by him, by Lord REDESDALE, who concurred in that judgment, and by Lord BROUGHAM, who was of counsel in that case, clearly show that the judgment in the House of Lords, as well as in the Court of Session, went upon the ground that the child was illegitimate because the law of the foreign country, in which the father was domiciled at the time of the birth of the child and of the subsequent marriage of the parents, did not allow legitimation by subsequent matrimony. Lord ELDON's judgment in the *Strathmore Peerage* case, 4 Wils. & Sh. Appx. 89-91, 95; s. c., 6 Paton, 645, 656, 657, 662. Lord REDESDALE's judgment in s. c., 4 Wils. & Sh. Appx. 93, 94, and 6 Paton, 660, 661; expounded by Lord LYNTHURST, in the presence and with the concurrence of Lord ELDON, in *Ross v. Ross*, 4 Wils. & Sh. 289, 295-297, 299; s. c., *nom. Munro v. Saunders*, 6 Bligh N. R. 468, 472-475, 478. Lord BROUGHAM in *Doe v. Vardill*, 2 Cl. & Fin. 571, 587, 592, 595, 600; s. c., 9 Bligh N. R. 32, 75, 80, 83; in *Munro v. Munro*, 7 Cl. & Fin. 842, 885; s. c., 1 Robinson, H. L. 492, 615; and in *Shedden v. Patrick*, 1 Macq. 622.

That decision is wholly inconsistent with the theory that upon general principles, independently of any positive rule of law, the question whether a person claiming an inheritance in real estate is the lawful child of the last owner is to be determined by the

ROSS v. ROSS.

lex rei sitæ ; for if that law had been applicable to that question, the plaintiff must have been held to be the legitimate heir ; and it was only by trying that question by the law of the domicile of his father that he was held to be illegitimate. The decision receives additional interest and weight from the fact that the case for the appellant (which is printed in 1 Macq. 539–552) was drawn up by Mr. Brougham, then a member of the Scotch bar, and contained a very able statement of reasons why the *lex rei sitæ* should govern.

In later cases in the House of Lords, like questions have been determined by the application of the same test of the law of the domicile. In the case of the *Strathmore Peerage*, above cited, which was what is commonly called a Scotch peerage, having been such a peerage before the union of the two kingdoms, the last peer was domiciled in England, had an illegitimate son there by an Englishwoman, and married her in England ; and it was held that by force of the law of England the son did not inherit the peerage. So in *Ross v. Ross*, above cited, where a Scotchman by birth became domiciled in England, and had a son there by an Englishwoman, and afterward went to Scotland with the mother and son, and married her there, retaining his domicile in England, and then returned with them to England and died there, it was held that the son could not inherit the lands of the father in Scotland, because the domicile of the father, at the time of the birth of the child and of the subsequent marriage, was in England. On the other hand, where a Scotchman, domiciled in Scotland, has an illegitimate son born in England, and afterward marries the mother, either in England, whether in the Scotch or in the English form, or in Scotland, the son inherits the father's land in Scotland, because the father's domicile being throughout in Scotland, the place of the birth or marriage is immaterial. *Dalhousie v. McDouall*, 7 Cl. & Fin. 817 ; s. c., 1 Rob. H. L. 475 ; *Munro v. Munro*, 7 Cl. & Fin. 842 ; s. c., 1 Rob. H. L. 492 ; *Aikman v. Aikman*, 3 Macq. 854 ; *Udny v. Udny*, L. R., 1. H. L. Sc. 441.

In the well known case of *Doe dem. Birtwhistle v. Vardill*, it was indeed held by the Court of King's Bench in the first instance, and by the House of Lords on writ of error, after two arguments, at each of which the judges attended and delivered an opinion, that a person born in Scotland, and there legitimate by reason of the subsequent marriage of his parents in Scotland, they having had

their domicile there at the time of the birth and of the marriage, could not inherit land in England. 5. B. & C. 438; 8 D. & R. 185; 2 Cl. & Fin. 571; 9 Bligh N. R. 32; 7 Cl. & Fin. 895; 6 Bing. N. C. 385; 1 Scott N. R. 828; West H. L. 500.

One curious circumstance connected with that case is, that under the English usage which allows counsel in a cause, if raised to the bench during its progress, to sit as judges in it, Chief Justice TINDAL, who had argued the case for the plaintiff in the King's Bench, gave the opinion of the judges in the House of Lords in accordance with which judgment was finally rendered for the defendant; and Lord BROUGHAM, who had taken part as counsel for the defendant in the first argument in the House of Lords, was most reluctant, for reasons which he stated with characteristic fulness and power, to concur in that judgment. 5 B. & C. 440; 2 Bl. & Fin. 582-598; 7 id. 924, 940-957.

But that case, as clearly appears by the opinions of Chief Justice ABBOTT and his associates in the King's Bench, as well as by that of the judges, delivered by Chief Justice TINDAL, and those of Lord BROUGHAM and Lord COTTENHAM, after the rehearing in the House of Lords, was decided upon the ground, that admitting that the plaintiff must be deemed the legitimate son of his father, yet by what is commonly called the Statute of Merton, 20 Hen. III., ch. 9, the parliament of England, a time when the English Crown had possessions on the Continent in which legitimation by subsequent matrimony prevailed, had, although urged by the bishops to adopt the rule of the civil and canon law, by which children born before the marriage of their parents are equally legitimate as to the succession of inheritance with those born after marriage, positively refused to change the law of England as theretofore used and approved. The *ratio decidendi* is most clearly brought out by Mr. Justice LITTLEDALE and by Chief Justice TINDAL.

Mr. Justice LITTLEDALE said: "One general rule applicable to every course of descent is, that the heir must be born in lawful matrimony. That was settled by the Statute of Merton, and we cannot allow the comity of nations to prevail against it. The very rule that a personal status accompanies a man everywhere is admitted to have this qualification, that it does not militate against the law of the country where the consequences of that status are sought to be enforced. Here it would militate against our statute law to give effect to that status of legitimacy acquired

by the lessor of the plaintiff in Scotland. He cannot therefore be received as legitimate heir to land in England." 5 B. & C. 455.

Upon the first argument in the House of Lords, Chief Baron ALEXANDER, adopting the sentiment and the language of Sir WILLIAM SCOTT in *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 58, 59, "varied only so far as to apply to a question of legitimacy what was said of a question respecting the validity of a marriage," said, in the name of all the judges who attended at that argument, "The cause being entertained in an English court must be adjudicated according to the principles of English law applicable to such a case; but the only principle applicable to such a case by the law of England is, that the status or condition of the claimant must be tried by reference to the law of the country where the status originated; having furnished this principle, the law of England withdraws altogether, and leaves the question of status in the case put to the law of Scotland." The learned chief baron added, "The comity between nations is conclusive to give to the claimant the character of the eldest legitimate son of his father, and to give him all the rights which are necessarily consequent upon that character." 2 Cl. & Fin. 573-575. The grounds upon which, notwithstanding this, he undertook, without alluding to the Statute of Merton and the practice under it, to maintain, that by the rules of inheritance and descent which the law of England had impressed upon all land in England, the plaintiff could not recover, were so unsatisfactory to the Lords, that Lord BROUGHAM, at that stage of the case, declared that he entertained a very strong opinion that the case was wrongly decided in the court below, and Lord LYNDEHURST and Lord DENMAN concurred in his motion that the case should be reargued. 2 Cl. & Fin. 598-600.

In delivering the opinion of the judges after the second argument Chief Justice TINDAL said: "The grounds and foundation upon which our opinion rests are briefly these, that we hold it to be a rule or maxim of the law of England with respect to the descent of land in England from father to son, that the son must be born after actual marriage between his father and mother; that this is a rule *juris positivi*, as are all the laws which regulate succession to real property, this particular rule having been framed for the direct purpose of excluding, in the descent of land in England, the application of the rule of the civil and canon law, by which the subsequent marriage between the father and mother was

held to make the son born before marriage legitimate ; and that this rule of descent, being a rule of positive law annexed to the land itself, cannot be allowed to be broken in upon or disturbed by the law of the country where the claimant was born, and which may be allowed to govern his personal status as to legitimacy, upon the supposed ground of the comity of nations." 7 Cl. & Fin. 925.

The chief justice then proceeded to make an elaborate statement of the provisions of the Statute of Merton, and of the circumstances under which it was passed, particularly dwelling upon the facts that at the time of its passage, Normandy, Aquitaine and Anjou were under the allegiance of the king of England, and those born in those dominions were natural-born subjects and could inherit land in England, and that many of the peers who attended appeared to have been of foreign lineage if not of foreign birth, and were, at all events, well acquainted with the rule of law which was then so strongly contested, "yet notwithstanding the rule of the civil and canon law prevailed in Normandy, Aquitaine and Anjou, by which the subsequent marriage makes the *antenatus* legitimate for all purposes and to all intents ; and notwithstanding the precise question then under discussion was whether this rule should govern the descent of land locally situate in England, or whether the old law and custom of England should still continue as to such land, under which the *antenatus* was incapable to take land by descent ; there is not the slightest allusion to any exception in the rule itself as to those born in the foreign dominions of the Crown, but the language of the rule is, in its terms, general and universal as to the succession to land in England." And he fortified his position that no such exception was intended, by referring to the forms of writs before and after the passage of the statute, and to Glanville, Bracton and other early authorities. 7 Cl. & Fin. 926-933.

It was upon the "very great new light" thus thrown upon the question, and the "very important additions" thus made to the former arguments, that Lord BROUGHAM, though not wholly convinced, waived his objections to judgment for the defendant. 7 Cl. & Fin. 939, 943-946, 956. And Lord COTTENHAM, the only other law lord present, in moving that judgment, said, "I am extremely satisfied with the ground upon which the judges put it, because they put the question on a ground which avoids the difficulty that

seems to surround the task of interfering with those general principles peculiar to the law of England, principles that at first sight seem to be somewhat at variance with the decisions to which the courts have come." 7 Cl. & Fin. 957. And see Lord BROUGHAM, Lord CRANWORTH, and Lord WENSLEYDALE, in *Fenton v. Livingstone*, 3 Macq. 497, 532, 544, 550.

In the case of *Don's Estate*, 4 Drewry, 194, Vice-Chancellor KINDERSLEY declared that the general principle was that "the legitimacy or illegitimacy of any individual is to be determined by the law of that country which is the country of his origin; if he is legitimate in his own country, then all other countries, at least all Christian countries, recognize him as legitimate everywhere;" and that the ground of the decision in *Doe v. Vardill* was, that admitting the personal status of legitimacy, the law of England attached to land certain rules of inheritance which could not be departed from. And he therefore held, that assuming that a son born in Scotland before the marriage of his parents domiciled there, and there legitimate in consequence of their subsequent marriage, was legitimate all over the world, at any rate in England, yet as he could not inherit land in England from his father or from any other person, so no other person could succeed to him by inheritance except his own issue.

So in *Shaw v. Gould*, L. R., 3 H. L. 55, 70, Lord CRANWORTH, said of *Doe v. Vardill*: "The opinions of the judges in that case, and of the noble lords who spoke in the House, left untouched the question of legitimacy, except so far as it was connected with succession to real estate. I think they inclined to the opinion that for purposes other than succession to real estate, for purposes unaffected by the Statute of Merton the law of the domicile would decide the question of status. No such decision was come to, for no question arose except in relation to heirship to real estate. But the opinions given in the case seem to me to show a strong bias toward the doctrine that the question of status must, for all purposes unaffected by the feudal law, as adopted and acted on in this country, be decided by the law of the domicile."

In *Skottowe v. Young*, L. R., 11 Eq. 474, the proceeds of lands in England were devised by a British subject domiciled in France, in trust to sell and to pay the proceeds to his daughters born of a Frenchwoman before marriage, but afterward legitimated according to the law of France; and it was held by Vice Chancellor

STUART, in accordance with a previous dictum of Lord Chancellor CRANWORTH, in *Wallace v. Attorney-General*, L. R., 1 Ch. 1, 8, that the daughters were not "strangers in blood," within the meaning of the English legacy duty act. The vice chancellor observed that in *Doe v. Vardill* the claimant was admitted to have in England the status of the eldest legitimate son of his father, and failed in his suit only because he could not prove that he was heir according to the law of England in which the land was; that this will was that of a domiciled Frenchman, and his status and that of his children must be their status according to the law of France, which according to *Doe v. Vardill* constituted their English status; and that "the status of these ladies being that of daughters legitimated according to the law of France by a declaration of the father, it is impossible to hold that they are for any purpose strangers in blood, on the mere ground that if they had been English, and their father domiciled in England, they would have been illegitimate."

It may require grave consideration, when the question shall arise, whether the legitimacy of a child, depending upon marriage of its parents or other act of acknowledgment after its birth, should not be determined by the law of the domicile at the time of the act which effects the legitimation, rather than by the law of the domicile at the time of the birth, or even of the marriage, when some other acknowledgment is necessary. See Sir Samuel ROMILLY's argument in *Shedden v. Patrick*, 5 Paton, 205; printed more at length in 1 Macq. 556-558; Lord BROUGHAM in *Munro v. Munro*, 7 Cl. & Fin. 882; s. c., 1 Rob. H. L. 612; Lord ST. LEONARDS in *Shedden v. Patrick*, 1 Macq. 641; *Stevenson v. Sullivan*, 5 Wheat. 207, 259; 2 Toullier Droit Civil (5th ed.), 217; Savigny's Private International Law, § 380; (Guthrie's ed.) 250 and note, 260.

These authorities do not appear to have been considered in those English cases, in which, under a bequest in an English will to "the children" of an Englishman, who afterward became domiciled in a foreign country, and there remarried the mother of his illegitimate children born there, whereby they became legitimate by the law of that country, Vice-Chancellor WOOD (afterward Lord HATHERLEY) and Vice-Chancellor STUART were of opinion that those children born before the change of domicile could not take, and differed upon the question whether those born after the change could take, Vice-

ROSS v. ROSS.

Chancellor STUART holding that they could, and Vice-Chancellor WOOD holding that they could not. *Wright's Trust*, 2 K. & J. 595; s. c., 25 L. J. (N. S.) Ch. 621; 2 Jur. (N. S.) 465; *Goodman v. Goodman*, 3 Giff. 643; *Boyes v. Bedale*, 1 Hem. & Mil. 798; Lord HATHERLEY in *Udny v. Udny*, L. R., 1 H. L. Sc. 441, 447; see also KINDERSLEY, V. C., in *Wilson's Trusts*, L. R., 1 Eq. 247, 264-266; Lord CHELMSFORD in s. c., *nom. Shaw v. Gould*, L. R., 3 H. L. 55, 80. But those opinions proceeded upon the construction of wills of persons domiciled in England; and Vice-Chancellor WOOD appears to have admitted that if the father had never been domiciled in England the rule would have been different. *Wright's Trust*, 25 L. J. (N. S.) Ch. 632; s. c., 2 Jur. (N. S.) citing *Ashford v. Tustin*, before PARKER, V. C., reported only in Lovell's Monthly Digest, 1852, p. 389; *Udny v. Udny*, L. R., 1 H. L. Sc. 448.

The dictum of Vice-Chancellor WOOD in *Boyes v. Bedale*, 1 Hem. & Mil. 805, and the decision of Sir GEORGE JESSEL, M. R., in the case of *Goodman's Trusts*, 14 Ch. D. 619, that the word "children" in the English statute of distributions means only children according to the law of England, and that therefore children born in a foreign country, and legitimated by the law of that country upon the subsequent marriage of their parents there, could not take by representation under that statute as children of their father, although he was domiciled in that country at the time of their birth and of the subsequent marriage, can hardly, as it seems to us, be reconciled with the general current of judicial opinion in England, as shown by the cases already referred to.

The most accomplished commentators on the subject, English and American, are agreed that the decision in *Doe v. Vardill*, which has had so great an influence with English judges, does not rest upon general principles of jurisprudence, but upon historical, political and constitutional reasons peculiar to England. Westlake's *Private International Law* (ed. 1858), §§ 90-93; (ed. 1880) intro. 9, §§ 53, 168; 4 Phillimore's *International Law* (2d ed.) § 538, note; Dicey on *Domicile*, 182, 188, 191, pref. iv; 2 Kent Com. 117, note *a*, 209, note *a*; 4 id. 413, note *d*; Story Confl., §§ 87, 87 *a* and note, 93 *i*, 93 *m*; REDFIELD, in Story Confl., § 93 *w* and note; Whart. Confl., § 242. Upon questions of comity of States, considerations derived from the feudal law, from an act of parliament of the time of Henry III and from the Constitution and policy of the English government, have no weight in Massachusetts at the present day.

Almost fifty years ago the legislature of this Commonwealth enacted that children born before the marriage of their parents and acknowledged by their father afterward, and legitimate children of the same parents, should inherit from each other as if all had been born in lawful wedlock; but did not make such illegitimate children capable of inheriting from their father. Stat. 1832, ch. 147. Whether this was accidental or designed, the commissioners on the revision of the statutes in 1835 reported to the legislature that they had no means to conjecture, not knowing the reasons on which the statute itself was founded, "the whole of it being an innovation upon the law as immemorially practiced and transmitted to us by our ancestors;" and therefore proposed a section making no change in this respect, but only expressing what they supposed to have been the intention of the framers of that statute; "leaving it to the wisdom of the legislature, if they should think fit to continue this law in force, to modify it in such manner as shall be thought proper." Report of Commissioners on Revised Statutes, ch. 61, § 4 and note. The legislature solved the doubt of the learned commissioners by making the statute more comprehensive, and enacting it in this form: "When, after the birth of an illegitimate child, his parents shall intermarry, and his father shall, after the marriage, acknowledge him as his child, such child shall be considered as legitimate to all intents and purposes, except that he shall not be allowed to claim, as representing either of his parents, any part of the estate of any of their kindred, either lineal or collateral." R. S., ch. 61, § 4.

In *Loring v. Thorndike*, 5 Allen, 257, a testator domiciled in this Commonwealth, by a will admitted to Probate before the Revised Statutes were passed, bequeathed a sum in trust to pay the income to his son for life, and the principal at his death "to his lawful heirs." After the Revised Statutes took effect, the son, whose domicile also was and continued to be in this Commonwealth, had two illegitimate children in Germany by a German woman, and afterward married her there in a form authorized by the law of the place, and there acknowledged them as his children. This court held that by the R. S., ch. 61, § 4, such children must be deemed legitimate for all purposes, except of taking by inheritance, as representing one of the parents, any part of the estate of the kindred, lineal or collateral, of such parent; and that the children took directly under the will of their grandfather, and not as the

Ross v. Ross.

representatives of their father, and were therefore not within the exception of the statute, but were entitled to the benefit of the bequest.

Still greater changes in the rules of the law of England as to the descent of real estate have been made by subsequent legislation in this Commonwealth. Aliens, whether residing here or abroad, may take, hold, convey and transmit real estate. Stat. 1852, ch. 29. Gen. Stat., chap. 90, § 38. *Lumb v. Jenkins*, 100 Mass. 527. And if the parents of an illegitimate child marry, and the father acknowledges him as his child, the child is to be deemed legitimate for all purposes whatsoever, whether of inheritance or settlement or otherwise. Stat. 1853, ch. 253; Gen. Sts., ch. 91, § 4. *Monson v. Palmer*, 8 Allen, 551. The statutes of adoption will be referred to hereafter.

In *Smith v. Kelly*, 23 Miss. 167, it was held that the status or condition of a person as to legitimacy must be determined by reference to the law of the country where such a status or condition had its origin, and that the status so ascertained adhered to him everywhere; and therefore that where, at the time of the birth of an illegitimate child and of the subsequent marriage of its parents, they were domiciled in South Carolina, in which such marriage did not make the child legitimate, and afterward removed with the child to Mississippi, by the law of which State subsequent marriage of the parents and acknowledgment of the child by the father would legitimize it, and the child was always recognized by the father as his child, yet the child, having had the status of illegitimacy in South Carolina, retained that status in Mississippi, and could not inherit or succeed to either real or personal property in Mississippi. That decision is a strong application of the law of the domicile of origin, and perhaps did not give sufficient effect to the father's recognition of the child in Mississippi after they had established their domicile in that State.

In *Scott v. Key*, 11 La. Ann. 232, while a father and his illegitimate son, whose mother he never married, were domiciled in the Territory of Arkansas, the legislature of that Territory passed a special statute enacting that the son should be made his father's legal heir and representative in as complete a manner as though he had been such from his birth, and should be as capable of inheriting his father's estate in a full and complete manner, as if his father had been married to his mother at the time of his birth,

and should be known and called by his father's name; and the father and son afterwards removed to Louisiana. The majority of the court held that the heritable quality of legitimacy, which the son had received from the legislature of the State of his residence, accompanied him when he changed his domicile, and that he was entitled to inherit his father's immovable property in Louisiana, to the exclusion of the father's brothers and sisters. Chief Justice MERRICK dissented, but only upon the ground that to allow such an act to have an extraterritorial effect would be to allow another State to provide a new class of heirs for immovables and successions in Louisiana; and that in order that personal statutes should be enforced in another country, there must be something in common between the jurisprudence of the two countries; and speaking of the conflicting rules of the civil law and the common law in regard to legitimation by subsequent matrimony, said, "The doctrine of the civil law ought to be enforced, doubtless, in those cases where our own statute recognizes a mode of legitimation by acknowledgment by notarial act and subsequent marriage, although the form in which it has been done in another State differs from our own." 11 La. Ann. 239. And see 4 Phillimore, § 542; Savigny (Guthrie's ed.), 258, 260, 264 and note.

In *Barnum v. Barnum*, 42 Md. 251, on the other hand, it was held, in the opinion of the majority of the court, that a special statute of the legislature of Arkansas, enacting that one person be constituted the heir of another, both of whom had a domicile there, making no reference to any marriage, and not even depending on the one being the child of the other, could have no extraterritorial operation whatever. See pp. 305, 307, 325. But the point decided was, that the former was not an "heir" of the latter, within the meaning of the will of the latter's father, who, nine years before the passage of the Arkansas statute, died domiciled in Maryland, the law of which does not appear to have permitted the creation of an heir in that manner.

The cases on this topic in other States, so far as they have come to our notice, afford little assistance. The decision in *Smith v. Derr*, 34 Penn. St. 126, that a child born out of wedlock, and legitimated by the law of another State where the father and child were domiciled, could not inherit land in Pennsylvania in 1855, was, as the court said, covered by the principle decided in *Doe v. Vardill*, for the Statute of Merton was then in force in Pennsylvania, although

ROSS v. ROSS.

since repealed there. See Report of the Judges, 3 Binn. 595, 600; Purd. Dig. (10th ed.), 1004. The decision in *Harvey v. Ball*, 32 Ind. 98, allowing a bastard child of parents who at the time of its birth and of their subsequent intermarriage, and until their death, had their domicile in Pennsylvania, to inherit land in Indiana under a statute of Indiana enacting that "if any man shall marry a woman who has, previous to the marriage, borne an illegitimate child, and after marriage shall acknowledge such child as his own, such child shall be deemed legitimate to all intents and purposes." was put exclusively upon the meaning attributed by the court to that statute, without regard to general principles or cases decided elsewhere; and upon any other ground would be inconsistent with the decision in the leading case of *Shedden v. Patrick*, before cited. In *Lingen v. Lingen*, 45 Ala. 410, in which it was held that a child, born in France of parents who never intermarried, and there acknowledged by his father according to the forms of the French law, and so made legitimate by that law, could not take a share in the father's estate in Alabama, the father's domicile was always in Alabama, and the child had not been legitimated in any manner allowed by the laws of that State.

The legal adoption by one person of the offspring of another, giving him the status of a child and heir of the parent by adoption, was unknown to the law of England or of Scotland, but was recognized by the Roman law, and exists in many countries on the continent of Europe which derive their jurisprudence from that law. Co. Lit. 7 b, 237 b.; 4 Phillim., § 531; Mack. R. L. 120-124; Whart. Confl., § 251. It was long ago introduced, from the law of France or of Spain, into Louisiana and Texas, and more recently, at various times and by different statutes, throughout New England, and in New York, New Jersey, Pennsylvania, and a large proportion of the other States of the Union. *Fuselier v. Masse*, 4 La. 423; *Vidal v. Commagère*, 13 La. Ann. 516; *Teal v. Sevier*, 26 Tex. 516; Miss. St. 1846; Hutch. Miss. Code, 501; Alabama Code of 1852, § 2011; N. Y. St. 1873, ch. 830; N. J. Rev. Sts. of 1877, § 1345; Penn. St. 1855, ch. 456; Purd. Dig. 61; 1 Southern Law Rev. (N. S.) 70, 79 and note, citing statutes of other States. One of the first, if not the very first, of the States whose jurisprudence is based exclusively on the common law, to introduce it, was Massachusetts.

By the Statute of 1851, ch. 324, upon the petition of any inhabitant of this Commonwealth, and of his wife, if he was a

married man, for leave to adopt a child not his own by birth, with the consent in writing of its parents, or the survivor of them, or if neither should be living, of the child's legal guardian, next of kin or next friend, and the consent of the child also if of the age of fourteen years or upwards, the judge of probate of the county in which the petitioner resided, upon being satisfied that the petitioner, or in case of husband and wife, the petitioners, were of sufficient ability to bring up the child and furnish it with suitable nurture and education, and that it was fit and proper that such adoption should take effect, was authorized to decree that the child should be deemed and taken to be, to all legal intents and purposes, the child of the petitioner or petitioners ; and the child so adopted was thereafter to be deemed, for the purposes of inheritance and succession by such child, custody of his person, duty of obedience to such parents or parent by adoption, and all other legal consequences and incidents of the natural relation of parents and children, the same as if he had been born of such parents or parent by adoption in lawful wedlock, saving only that he should not be capable of taking property expressly limited to the heirs of the body of the petitioner or petitioners. Stat. 1851, ch. 324, §§ 1-6. And by the statute of 1854, ch. 24, the petitioner was authorized to have the name of the child changed at the same time. These provisions were substantially re-enacted in 1860, and again in 1871, with a further exception that the adopted child should not be capable of taking property from the lineal or collateral kindred of such parents by the right of representation. Gen. Stat., ch. 110, §§ 1-8, 13; Stat. 1871, ch. 310.

The statute of Pennsylvania of 1855, which is made part of the case stated, and under which the demandant was adopted by the intestate in 1871, while both were domiciled in that State, corresponds to these statutes of this Commonwealth in most respects. Like them it permits any inhabitant of the State to petition for leave to adopt a child ; it requires the petition to be presented to a court in the county where the petitioner resides ; it requires the consent of the parents or surviving parent of the child ; it authorizes the court, upon being satisfied that it is fit and proper that such adoption should take effect, to decree that the child shall assume the name, and have all the rights and duties of a child and heir, of the adopting parent ; and it makes the record of that decree evidence of that fact.

The statute of Pennsylvania differs from our own only in not requiring the consent of the petitioner's wife, and of the child if more than fourteen years of age; in omitting the words "as if born in lawful wedlock" in defining the effect of the adoption; in also omitting any exception to the adopted child's capacity of inheriting from the adopting parent; and in expressly providing that if the adopting parent has other children, the adopted child shall share the inheritance with them in case of intestacy, and he and they shall inherit through each other as if all had been lawful children of the same parent.

In *Commonwealth v. Nancrede*, 32 Penn. St. 389, it was held that a child adopted under the act of 1855, and to whom the adopting father had devised and bequeathed all his estate, was not exempt from the collateral inheritance tax under an earlier statute of that State; and Chief Justice LOWRIE said: "It is property devised or descending to children or lineal descendants that is exempt from the tax. If the heirs or devisees are so in fact, they are exempt; all others are subject to the tax. Giving an adopted son a right to inherit does not make him a son in fact. And he is so regarded in law, only to give the right to inherit, and not to change the collateral inheritance tax law. As against that law, he has no higher merit than collateral blood relations of the deceased, and is not at all to be regarded as a son in fact." The scope and meaning of that decision appear more clear by referring to the terms of the earlier statute, which imposed such a tax on all estates passing from any person dying seized thereof, either testate or intestate, to any person other than the "father, mother, husband, wife, children and lineal descendants born in lawful wedlock." *Purd. Dig.* 214, 215. The whole effect of the decision therefore was, that a child adopted under the act of 1855 was not exempt from the tax, because he was not a "child born in lawful wedlock," or in the words of the chief justice, not "a son in fact."

In *Schafer v. Eneu*, 54 Penn. St. 304, a testator who died before the passage of the adoption act of 1855, devised property in trust for the sole and separate use of his daughter for life, and on her death to be conveyed to her children and the heirs of her children forever, and made a residuary devise to his own children, by name in fee; the daughter afterward adopted three children under the act of 1855, and died leaving no other children; and it was held that the estate devised went to the children of the testator, and not

to the adopted children of the daughter. Mr. Justice STRONG, in delivering judgment, referred to *Commonwealth v. Nancrede*, above cited, and said: "Adopted children are not children of the person by whom they have been adopted, and the act of assembly does not attempt the impossibility of making them such." "The right to inherit from the adopting parent is made complete, but the identity of the child is not changed. One adopted has the rights of a child without being a child." And he added that the testator's own children had a vested interest under his will, when the act of 1855 was passed, which it was not in the power of the legislature to take away.

We are not required, and are hardly authorized, for the purposes of the present case, to consider whether the first of these decisions can be reconciled in principle with that of Vice-Chancellor STUART in *Skottowe v. Young*, L. R., 11 Eq. 474, above referred to, or the second with those of this court in *Sewall v. Roberts*, 115 Mass. 262, and *Loring v. Thorndike*, 5 Allen 257. We assume them to establish conclusively that by the law of Pennsylvania a child adopted by a man under the act of 1855, not being a child born to him in wedlock, is not his child, within the terms of the collateral inheritance tax act of that State, nor within the meaning of the will of a third person, domiciled in that State, who died before adoption had any legal existence there.

But the opinion in each of those cases clearly recognizes, what is indeed expressly enacted in the statute, that as between the adopted child and the adopting father, the child has all the rights and duties of a child, and the capacity to inherit as such. According to one of the most learned and thoughtful writers on jurisprudence of our time, it is the rights, duties, and capacities, arising from the event which creates a particular status, that constitute the status itself and afford the best definition of it, ² Austin on Jurisprudence (3d ed.) 706, 709-712, 974. By the law of Pennsylvania, therefore, as enacted by its legislature and expounded by its highest judicial tribunal, the demandant, as between him and his adopting father, has in all respects the legal status of a child.

The law of the domicile of the parties is generally the rule which governs the creation of the status of a child by adoption. *Foster v. Waterman*, 124 Mass. 592; 4 Phillimore, § 531; Whart. Conf., § 251. The status of the demandant, as adopted child of the

ROSS v. ROSS.

intestate, in the State in which both were domiciled at the time of the adoption, was acquired in substantially the same manner, and was precisely the same so far as concerned his relation to, and his capacity to inherit the estate of, the adopting father, as that which he might have acquired in this Commonwealth, had the parties been then domiciled here. In this respect, there is no conflict between the laws of the two Commonwealths. The difference between them in regard to the consent of the wife of the adopting father, and to the inheritance of estates limited to heirs of the body, or inheritance from the kindred, or through the children, of such father, is not material to this case, in which the only question is whether the adopted child or a brother of the adopting father has the better title to land in the absolute ownership of such father at the time of his death. Whatever effect the want of formal consent, on the part of the wife of the intestate, to the adoption of the demandant, might have, if she were claiming any interest in her husband's estate, it can have no bearing upon this controversy between the adopted child and a collateral heir.

The tenant in his argument laid much stress on the words of the statute of descents and of the statutes of adoption of this Commonwealth.

The statute of descents which was in force at the time of the death of the intestate in 1873 enacts that when a person dies intestate, seized of any real estate, it shall descend, subject to his debts, and saving rights of homestead, "in the manner following: First. In equal shares to his children, and to the issue of any deceased child by right of representation; and if there is no child of the intestate living at his death, then to all his other lineal descendants," etc. "Second. If he leaves no issue, then to his father. Third. If he leaves no issue nor father, then in equal shares to his mother, brothers, and sisters," etc. "Eighth. If the intestate leaves a widow and no kindred, his estate shall descend to his widow; and if the intestate is a married woman and leaves no kindred, her estate shall descend to her husband. Ninth. If the intestate leaves no kindred, and no widow or husband, his or her estate shall escheat to the Commonwealth." Gen. Sts., ch. 91, § 1. See also Stat. 1876, ch. 220.

But this section must be understood as merely laying down general rules of inheritance, and not as completely and accurately defining how the status is to be created which gives the capacity to

inherit. It does not undertake to prescribe who shall be considered a child, or a widow, or a husband, or what is necessary to constitute the legal relation of husband and wife, or of parent and child. Those requisites must be sought elsewhere. The words "children" and "child," for instance, in the first clause, "issue," in the phrase "if he leaves no issue," in subsequent clauses, and "kindred," in the last two clauses of this section, clearly include a child made legitimate by the marriage of its parents and acknowledgment by father after its birth under section 4 of the same chapter, or a child adopted under the provisions of chapter 110 of the General Statutes, or chapter 310 of the Statutes of 1871.

These statutes, after providing how a child may be adopted in this Commonwealth with the sanction of a decree of the Probate Court in the county in which the adopting parent resides (or under the Statute of 1871, in the county where the child resides, if the adopting parent is not an inhabitant of this Commonwealth), enact that a child "so adopted" shall be deemed, for the purpose of inheritance, and other legal consequences of the natural relation of parent and child, to be the child of the parent by adoption. Stat. 1851, ch. 324, § 6; Gen. Sta. ch. 100, § 7; Stat. 1871, ch. 310, § 8. It is argued that the words "so adopted" imply that the children otherwise adopted are incapable of inheriting lands in this Commonwealth. But it appears to us that these words, in the connection in which they stand, warrant no such implication; and that the legislature, throughout these statutes, had solely in view adoption by or of inhabitants of this Commonwealth, and did not intend either to regulate the manner, or to define the effects of adoption by and of inhabitants of other States according to the law of their domicile.

We are not aware of any case, in England or America, in which a change of status in the country of the domicile, with the formalities prescribed by its laws, has not been allowed full effect, as to the capacity thereby created of succeeding to and inheriting property, real as well as personal, in any other country, the laws of which allow a like change of status in a like manner with a like effect under like circumstances.

We are therefore of opinion that the legal status of child of the intestate, once acquired by the demandant under a statute and by a judicial decree of the State of Pennsylvania, while the parties were domiciled there, continued after their removal into this Com-

Holden v. Fitchburg Railroad Company.

monwealth, and that by virtue thereof the demandant is entitled to maintain this action.

It is worthy of mention (although it cannot of course affect the rights of inheritance which had absolutely vested on the death of the intestate; *Tirrell v. Bacon*, 3 Fed. Rep. 62) that by a recent statute of this Commonwealth "any inhabitant of any other State, adopted as a child in accordance with the laws thereof, shall, upon proof of such fact, be entitled in this Commonwealth to the same rights, as regards succession of property, as he would have enjoyed in the State where such act of adoption was executed, except in so far as they conflict with the provisions of this act." Stat. 1876, ch. 213, § 11.

Judgment for the demandant.

NOTE BY THE REPORTER. — This case is distinguished in *Keegan v. Geraghty*, Illinois Supreme Court, Nov. 1881, where it is held that the adoption law of Wisconsin will not be recognized in Illinois so as to enable the child to inherit from the lineal or collateral kindred of the adopting parents.

HOLDEN V. FITCHBURG RAILROAD COMPANY.

(129 Mass. 268.)

Master and servant — negligence — dangerous structure.

A railway company is liable for an injury sustained by one of its brakemen, by the fall of a derrick erected by its employees at the side of its tracks, in such a position as to be liable to cave away with the bank, and negligently suffered so to remain.*

ACTION by employee for personal injuries by fall of derrick.
Facts in last two paragraphs of opinion.

F. P. Goulding, for plaintiff.

G. A. Torrey (*T. K. Ware* with him), for defendant.

GRAY, C. J. It is well settled in this Commonwealth, and in Great Britain, that the rule of law, that a servant cannot maintain an action against his master for an injury caused by the fault or negligence of a fellow-servant, is not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other, but extends to every case in

* To same effect, *Chicago and Iowa Railroad Co. v. Russell* (91 Ill. 208), 32 Am. Rep. 54.

Holden v. Fitchburg Railroad Company.

which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty. *Farwell v. Boston & Worcester Railroad*, 4 Metc. 49; *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; *Morgan v. Vale of Neath Railway*, 5 B. & S. 570, 736, and L. R., 1 Q. B. 149; *Wilson v. Merry*, L. R., 1 H. L. Sc. 326.

In *Farwell v. Boston & Worcester Railroad*, which has long been considered, both in this country and in England, the leading case upon the subject, Chief Justice SHAW, in delivering the judgment of the court, said: "The general rule, resulting from considerations as well of justice as of policy, is that he who engages in the employment of another for the performance of specified duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others." 4 Metc. 57. "The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer; but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand toward him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master therefore from liability for the negligence of a fellow-servant does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third persons and strangers for the negligence of a servant." 4 Metc. 60, 61.

In that case, the business of a railroad corporation within the

Holden v. Fitchburg Railroad Company.

meaning of the rule, was defined to be "to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire" (4 Metc. 55); and it was held, that a railroad corporation was not liable to the driver of the locomotive engine of a passenger train for an injury sustained in consequence of the negligence of a switchman in the management of a switch. Upon the same principle, it has been held by this court, that an apprentice acting as fireman of a locomotive engine is a fellow-servant with those employed to construct switches on the tracks of the railroad (*King v. Boston & Worcester Railroad*, 9 Cush. 112); that a laborer employed to repair the road-bed, or a carpenter employed to repair bridges and fences and to do like work on the line of the railroad, is a fellow-servant with those in charge of the train by which he was being carried to his place of labor (*Gilshannon v. Stony Brook Railroad*, 10 Cush. 228; *Seaver v. Boston & Maine Railroad*, 14 Gray, 466); and that a carpenter employed in the repair shop, and being so carried, is a fellow-servant with a flagman or switchman. *Gilman v. Eastern Railroad*, 10 Allen, 233, and 13 id. 433. The rule has been steadfastly upheld by the English courts under similar circumstances. *Hutchinson v. York, Newcastle & Berwick Railway*, 5 Exch. 343; *Waller v. Southeastern Railway*, 2 H. & C. 102; *Morgan v. Vale of Neath Railway*, above cited; *Tunney v. Midland Railway*, L. R., 1 C. P. 291. See, also, *Lovell v. Howell*, 1 C. P. D. 161; *Charles v. Taylor*, 3 id. 492. And it makes no difference that the servant whose negligence causes the injury is a submanager or foreman, of higher grade or greater authority than the plaintiff. *Albro v. Agawam Canal*, 6 Cush. 75; *Zeigler v. Day*, 123 Mass. 152; *Walker v. Boston & Maine Railroad*, 128 id. 8; *Gallagher v. Piper*, 16 C. B. (N. S.) 669; *Feltham v. England*, L. R., 2 Q. B. 33; *Wilson v. Merry*, above cited; *Howells v. Landore Steel Co.*, L. R., 10 Q. B. 62.

Nothing was decided in *Ford v. Fitchburg Railroad*, 110 Mass. 240, s. c., 14 Am. Rep. 598, inconsistent with this view. The meaning of the statement on page 260, "The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it," is explained by the sentence that immediately follows, "They are charged with the master's duty to his servant." The decision in that case was, that if a railroad corporation, acting by its proper officers and agents, did

Holden v. Fitchburg Railroad Company.

not use due care in keeping a locomotive engine in repair, the driver of the engine might maintain an action against the corporation for personal injuries caused by the defective condition of the engine; and that there was no error in a refusal to instruct the jury that the corporation was not liable, unless the plaintiff proved that the president, directors or superintendent either personally knew, or by the exercise of reasonable care in the performance of their duties might have known, that the engine was defective, or that the persons employed to have the charge of it and keep it in repair were incompetent; because, as was said in the opinion, "the question was not whether the officers named knew, or might have known, of the defect, or of the incompetency of those who had charge of the repairs, but whether the corporation in any part of its organization, by any of its agents, or for want of agents, failed to exercise due care to prevent injury to the plaintiff from defects in the instrument furnished for his use." 110 Mass. 261.

If a master uses reasonable care in employing suitable servants, in supplying and keeping in repair suitable structures and engines, and in giving proper directions and taking due precautions as to their use, he is not responsible to one servant for the negligence of another in the management and use of such structures and engines in carrying on the master's work. The decisions of this court furnish illustrations of this application of the rule under a great variety of circumstances. *Albro v. Agawam Canal*, above cited; *Durgin v. Munson*, 9 Allen, 396; *Duffy v. Upton*, 113 Mass. 544; *Avilla v. Nash*, 117 id. 318; *Hodgkins v. Eastern Railroad*, 119 id. 419; *O'Connor v. Roberts*, 120 id. 227; *Kelley v. Norcross*, 121 id. 508; *Harkins v. Standard Sugar Refinery*, 122 id. 400; *Zeigler v. Day*, 123 id. 152; *Colton v. Richards*, 123 id. 484; *Smith v. Lowell Manuf. Co.*, 124 id. 114; *Morse v. Glendon Co.*, 125 id. 282; *Kelley v. Boston Lead Co.*, 128 id. 456. See also *Tarrant v. Webb*, 18 C. B. 797; *Hall v. Johnson*, 3 H. & C. 589; *Wilson v. Merry*, above cited.

The reasons and the limits of the rule, so applied, are clearly brought out in the judgments delivered in the House of Lords in *Wilson v. Merry*. In that case, the defendants, who were coal and iron masters, had used due care in selecting the submanager of a coal pit, and had furnished him with all necessary implements and resources for working the pit, and there was no defect in the general system of ventilation; the submanager, in order to open a seam of coal, built a scaffold which obstructed the circulation of air

Holden v. Fitchburg Railroad Company.

beneath, and caused an accumulation of fire-damp, which exploded and injured a workman in the mine; and for this injury the action was brought.

Lord Chancellor CAIRNS stated the reason of the general rule substantially in the same way as Chief Justice SHAW had done in 4 Metc. 60, above cited, and said: "The master is not, and cannot be, liable to his servant, unless there be negligence on the part of the master in that which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business." "But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master." L. R., 1 H. L. Sc. 332.

Lord CRANWORTH said: "In order effectually to carry on the work, it was necessary that a scaffolding should be fixed under the superintendence of an underground manager, and when so fixed it was necessary that workmen should be employed at it in excavating the mine under similar superintendence." "If, indeed the owners had failed to take reasonable care in causing the scaffold to be erected, the case would have been different, but of this there is no evidence. It certainly was not incumbent on them personally to fix the scaffold. They discharged their duty when they procured the services of a competent underground manager." L. R., 1 H. L. Sc. 334, 335.

Lord CHELMSFORD pointed out the distinction between that "system of ventilation and putting the mine into a safe and proper condition for working," which "it was the duty of the master for whose benefit the work is being carried on to provide," and the system of what might be called "local ventilation," which it became necessary to arrange in the course of working the pit, and which must be considered as part of the mining operations; and observed that even if the accident happened in consequence of the scaffold in the particular seam having, under the sub-manager's orders, been so constructed as to obstruct the necessary ventilation, it would have been the result of negligence in the course of working the

Holden v. Fitchburg Railroad Company.

mine, and one of the risks incident to the employment. L. R., 1 H. L. Sc. 336, 337.

Lord COLONSAY said : “ I think that there are duties incumbent on masters with reference to the safety of laborers in mines and factories, on the fulfillment of which the laborers are entitled to rely, and for the failure in which the master may be responsible. A total neglect to provide any system of ventilation for the mine may be of that character. Culpable negligence in supervision, if the master takes the supervision on himself ; — or where he devolves it on others, the heedless selection of unskilful or incompetent persons for duty, — or the failure to provide, or supply the means of providing, proper machinery or materials ; — may furnish grounds of liability ; and there may be other duties, varying according to the nature of the employment, wherein, if the masters fails, he may be responsible.” But he was of opinion that the direction of the judge under which a verdict had been returned against the defendants was objectionable, because it apparently dealt with the alleged defect in the scaffold as if it was a defect in the general arrangement or system of ventilation of the pit, for which in certain views the defendants might be regarded as liable ; whereas it was a defect in the construction of a temporary structure erected by order of the sub-manager for certain working operations, whereby the free action of a good system of ventilation was temporarily interfered with, which raised a totally different question for the consideration of the jury in reference to the liability of the defendants for the fault of the sub-manager ; and this was one of the grounds on which a new trial was ordered. L. R., 1 H. L. Sc. 344–346.

In *Farwell v. Boston & Worcester Railroad*, Chief Justice SHAW said : “ We are far from undertaking to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam-engine. Whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of willful misconduct or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated company — are questions on which we give no opinion.” 4 Metc. 62.

By subsequent decisions it has been settled that the master, whether a natural person or a corporation, is bound to use reason-

Holden v. Fitchburg Railroad Company.

able care in selecting his servants, and in keeping the engines with which, and the buildings, places and structures in, upon or over which, his business is carried on, in a fit and safe condition, and is liable to any of his servants for injuries suffered by them by reason of his negligence in this respect. *Cayzer v. Taylor*, 10 Gray, 274; *Snow v. Housatonic Railroad*, 8 Allen, 441; *Gilman v. Eastern Railroad*, above cited; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; s. c., 3 Am. Rep. 506; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282. The master does not warrant the safety or sufficiency of such places, buildings, structures or engines. *Ladd v. New Bedford Railroad*, 119 Mass. 412; s. c., 20 Am. Rep. 331. But he is bound to use reasonable care, having regard to the nature of the business and the circumstances of the case, to secure their safety and sufficiency.

It is difficult, if not impossible, to lay down a more definite rule applicable to all cases. As to switches or turn-tables upon the line of a railroad, the employment of suitable persons to select, construct or inspect has been held to satisfy the obligation of the corporation. *King v. Boston & Worcester Railroad*, Suffolk, November Term, 1851; s. c., 9 Cush. 112; *Sammon v. New York & Harlem Railroad*, 62 N. Y. 251; *Potts v. Port Carlisle Dock & Railway*, 2 L. T. (N. S.) 283. On the other hand, where a locomotive engine in actual use is imperfectly constructed, or is worn out, it has been held that the fact that the corporation has employed suitable persons to construct it or to keep it in repair does not, as matter of law, afford a conclusive defense; but that the question is whether, under all the circumstances, the corporation, acting by its appropriate officers or agents, has used that diligence and taken those precautions which its duty as a master requires. *Ford v. Fitchburg Railroad*, 110 Mass. 240; s. c., 14 Am. Rep. 598; *Hough v. Railway Co.* 100 U. S. 213. See, also, *Searl v. Lindsay*, 11 U. B. (N. S.) 429; *Allen v. New Gas Co.*, 1 Ex. D. 251; *Murphy v. Phillips*, 35 L. T. (N. S.) 477.

If a railroad corporation has suffered a structure, not actually in use for the purposes of its business, to remain for an unreasonable length of time, on land within its control, in such a position by the side of its track as to be in danger of being thrown down by ordinary natural causes so as to interfere with the safe passage of its trains, the structure is in law a nuisance, and the corporation is liable to servants employed upon its passing trains, as well as to

Holden v. Fitchburg Railroad Company.

other persons, for injuries resulting from its own neglect in not removing the structure, or in not guarding against the danger of allowing it to remain in such a place, whether it was originally put there by other servants of the corporation or by strangers, and independently of the question of negligence on the part of those who placed it there.

In the case at bar, the workmen employed in widening the railroad were fellow-servants of the brakemen on the trains; and it being admitted that the derrick was suitable for the work for which it was designed, and there being no evidence of negligence on the part of the corporation in selecting or instructing the workmen, any negligence of theirs in setting up or using the derrick is the negligence of fellow-servants of the plaintiff, for which the defendants cannot be held liable in this action.

But the evidence at the trial tended to show that the derrick had remained unused by the side of the track, dangerously near an overhanging bank of earth and stones, in plain view, and with a guy loosely stretched across the track (though at a sufficient height when the derrick was upright to clear the passing trains) for at least ten days while the weather was alternately freezing and thawing; that on the day preceding the night on which the plaintiff was injured the bank thawed, and it was apparent to any one who looked at it that a large mass of the bank was loosened and ready to fall upon the derrick; and that just before the freight train on which the plaintiff was at work came along, such a mass broke off from the bank, and fell upon the derrick, knocking it down and bringing the guy stretched across the track into such a position that it swept over the top of the train and struck the plaintiff, causing the injury sued for. This evidence would warrant a jury in finding that the defendant corporation had not used the care which the circumstances required to keep the track in a safe condition, and to guard against the impending danger.

Case to stand for trial.

DICKINSON v. CENTRAL NATIONAL BANK.

(129 Mass. 279.)

Stock — transfer — rights between purchaser and assignee in bankruptcy.

The owner of National bank stock delivered his certificate, with a power of attorney to transfer the stock, as collateral security for his note. The by-laws of the bank provided that stock was assignable only on its book, subject to the National Banking Act, and that a transfer book should be kept, and that the old certificates should be surrendered and new ones issued. The owner of the stock afterward went into bankruptcy. On notice to him and his assignee the payee sold the stock, and the bank, refusing the demand of the assignee for a transfer, transferred it to the purchaser. *Held*, that the bank was not liable to the assignee for a conversion. Also *held*, that evidence was incompetent to show that the original transfer was kept secret, in order that the owner, a director of the bank, might get a false credit at the bank, the bank having no knowledge or notice of the arrangement. (*See note, p. 353.*)

ACTION for conversion. The head note and opinion sufficiently show the facts.

G. F. Hoar & R. Hoar, for plaintiff.

F. T. Blackmer, for defendant.

COLT, J. It was decided in *Fisher v. Essex Bank*, 5 Gray, 373, that the shares in the bank whose charter provides that they shall "be transferable only at its banking-house and on its books," cannot be effectually transferred, as against a creditor of the vendor, who attaches them without notice of any transfer, by a delivery of the certificates thereof together with an assignment and blank power of attorney from the vendor to the vendee, even if notice of such transfer be given to the bank before the attachment. The express provision of the charter regulating the mode of transfer was declared to have the force of a general provision of law binding on the corporation and its stockholders, and on all other persons.

But it was decided in *Sargent v. Essex Marine Railway*, 9 Pick. 202, that an assignment of shares by deed, accompanied by delivery of the certificates to the purchaser, was valid between the parties, and against attaching creditors, although the by-laws of the corporation required that all transfers should be made in the treasurer's

Dickinson v. Central National Bank.

Queen's Bench in 1868, in a case quite analogous to this, against the right of seizing shares of the apparent owner, said that it was a rule applied by that court more than a hundred years before, in the analogous case of the statutory execution under the bankrupt law, that the creditors can have no more than a debtor was entitled to in equity or at law. *Pickering v. Ilfracombe Ry. Co., L. R., 3 C. P. 285, 251.*

"It has been the law of the Lord Mayor's Court in London, from the time of Richard I, that an equitable assignment of a *chose in action* should prevail against an attachment. *Westoby v. Day*, 2 E. & B. 606. This application of the rule obtains in Massachusetts, and in the United States generally, though a few courts hold otherwise. *Drake on Attachments*, ch. 24; *Thayer v. Daniels*, 118 Mass. 129, and cases cited.

"The doctrine is so familiar that I will merely cite authorities to show that it is the general rule in Massachusetts as well as elsewhere. The exceptions to it in this State I will consider afterward. See *Wakefield v. Martin*, 8 Mass. 558; *Dix v. Cobb*, 4 id. 508; *Kendall v. Lawrence*, 23 Pick. 540; *Kingman v. Perkins*, 105 Mass. 111; *Thayer v. Danick*, 118 id. 129; *Boston Music Hall Ass'n v. Cory*, 129 id. 435.

"3. The incorporeal property of the shareholder in a company of this sort is represented by his certificates; and if these are conveyed, the failure to record the conveyance is not evidence of such a constructive fraud as sometimes arises from the possession of chattels after the property has been parted with. On the contrary, it was proved in early cases to be the usage, and is now adopted by the courts as law based on such usage, that the possession of the certificates, with a power to transfer them, is *prima facie* evidence of title; and if in fact the possessor has given value, his title cannot be impeached even by subsequent purchasers who did not receive the certificates, much less by creditors of the transferrer. In late cases these certificates are likened to bills of lading and other quasi negotiable securities. See *Black v. Zacharie*, 3 How. 483; *Bank v. Lanier*, 11 Wall. 309; *Johnston v. Laflin* (S. C. U. S.), 23 Alb. L. J. 393; *U. S. v. Vaughan*, 3 Binney, 394, approved in *U. S. v. Cutts*, 1 Sumn. 133; *Finney's Appeal*, 59 Penn. St. 398; *Wood's Appeal*, 10 Rep. 125; *Smith v. Crescent City Co.*, 30 La. Ann. 1578; *N. Y. & N. H. R. Co. v. Schuyler*, 34 N. Y. 80; *McNeil v. Tenth Nat. Bank*, 46 id. 325; s. c., 7 Am. Rep. 341; *Winter v. Belmont Mining Co.*, 58 Cal. 428; *Fraser v. Charleston*, 11 S. C. 486; *Strong v. Houston R. Co.*, 10 Rep. 28; *Broadway Bank v. McElorath*, 18 N. J. Eq. 24; s. c., 24 id. 496; *Prall v. Tull*, 28 id. 483; *Merchants' Bank v. Richards*, 6 Mo. App. 454; *Canant v. Seneca Co. Bank*, 1 Ohio St. 298; *Duke v. Cahawba Navigation Co.*, 10 Ala. 82; *Ross v. S. W. R. Co.*, 53 Ga. 514.

"In many of the foregoing cases there were laws providing for the transfer of shares upon the books of the company. But the courts held that this registration was intended chiefly for the convenience of the company, to enable it to know who should have dividends and who should vote. No doubt it is sometimes intended as a record of persons liable for the debts of the company, and is so in the case of National Banks; but the great weight of authority is that it is not intended for the benefit of creditors of the individual shareholders. Some of the courts hold that the unrecorded transfer passes only an equitable title; others, that it gives a legal title. I assume that by the decisions in the courts of the United States only an equitable title is acquired. That point is unimportant.

"4. The statutes of many, perhaps of most, of the States, provide that certain conveyances of land and of chattels shall be recorded, and that until record is made, a conveyance shall have no effect excepting between the parties, and in most cases those having actual notice. An attaching or seizing creditor, without notice of a prior conveyance, is undoubtedly within the words of these statutes; and so such creditors have come to be treated, and even spoken of, as in some sort purchasers. A few of the statutes requiring registration of the shares of companies follow the exact language of these registry laws, and declare that no unrecorded title shall be good, or only against persons having notice. In California, even, such a law is held not to avail creditors (*Winter v. Belmont Co.*, 58 Cal. 428); but in Maine and Massachusetts, the decision, and perhaps the better one, is that such a law must be construed like other similar registry laws. *Skowhegan Bank v. Cutler*, 49 Me. 815; *Rock v. Nichols*, 8 Allen, 342. It was in this state of things that the case which is the support of the defense here was decided. In *Fisher v. Essex Bank*, 5 Gray, 373, the charter of a bank incorporated in Massachusetts provided that the shares should be transferred only at the banking-house, and upon the books of the company, and the court held that an attaching creditor could hold against an earlier unrecorded transfer for value. I

Dickinson v. Central National Bank.

have studied this decision with care. It seems to proceed upon the theory that by the charter, which is a public statute, there can be no such thing as an equitable transfer, or at any rate, none except by a sort of equitable estoppel between the parties, and that it was a part of the intent of the act that a creditor at law should have the legal right to attach the legal title. This decision has been followed in Illinois (*People's Bank v. Gridley*, 91 Ill. 457), but rejected in the other States, so far as their courts have passed upon it. It is sometimes spoken of as being the law of Connecticut and Vermont, but the early cases in the former State are much modified by *Colt v. Ives*, 81 Conn. 25. The case cited from Vermont (*Rice v. Curtis*, 32 Vt. 464) is not in point. It is opposed directly to many of the cases already cited under the third point, and to the general principle that attaching creditors are bound by all equities, including equitable estoppels. It has moreover been seriously modified, if not wholly overruled, in Massachusetts, in *Dickinson v. Central Nat. Bank*, 129 Mass. 279, printed, but not yet published. The Central National Bank had a by-law like that now in question, and A., the owner of ten of its shares, had transferred them by way of security, precisely as Conant transferred his shares, and afterward became bankrupt. The transferee, still later, sold the shares at public auction, under his power, after due notice to A. and to his assignee. The bank, notwithstanding a notice and demand by the assignee in bankruptcy, transferred the shares to the purchaser. The assignee sued the bank for damages, but was defeated. COLT, J., delivering the opinion of the court, says that *Fisher v. Essex Bank*, *ubi supra*, does not apply, because in that case the charter had the force of a general law, but that a by-law has no such effect (citing *Sargent v. Essex Marine R. Co.*, 9 Pick. 201), and that in the absence of such a general law the transferee took an equitable title which should prevail against the assignee in bankruptcy of the transferor. The only circumstances in *Fisher v. Essex Bank*, not found in *Dickinson v. Central Bank*, are these: (1) The law in the former case contained the word 'only'—that the shares should be transferred only so and so; (2) that an attaching creditor and not an assignee in bankruptcy was concerned; (3) that the law governing the company was a Massachusetts law, which might be differently construed from a National banking act. The first and third points, of course, are the same in this case as in the later one in Massachusetts. The second is not sound in this court; an assignee and attaching creditor stand precisely alike, according to the law which governs this controversy.

"5. The doctrine of *Dearle v. Hall*, 8 Russ. 1, confirmed in *Fowler v. Cockrell*, 8 Cl. & Fin. 466, is much relied on by the defendants. This doctrine is that of two innocent purchasers of merely equitable interests he shall be preferred who first gives notice to the trustee or holder of the legal title. To this there are several answers: 1. Though the corporation is for some purposes a trustee for the shareholders, the latter have an independent legal property in their shares which they can convey, and whether their actual conveyance is legal or equitable is of no consequence. 2. The doctrine applies in England only to purchasers, and not to creditors seizing or attaching, even though a statute gives a right to seize all shares standing in the debtor's name in his own right. The statute was once held by the Queen's Bench to mean that the creditor might seize what the register showed to be apparently the property of the debtor (*Watts v. Porter*, 8 E. & B. 749); but this has been overruled, on the ground that the legislature cannot be supposed to have intended to take one man's property for another man's debt, without the most explicit statement of such a purpose; and therefore the 'right' refers to the equitable as well as legal right. *Dunster v. Lord Glenall*, 3 Ir. Ch. 47; *Scott v. Lord Hastings*, 4 K. & J. 633; *Beaven v. Earl of Oxford*, 6 D. M. & G. 524; *Eyre v. McDonald*, 9 H. L. 619; *Robinson v. Nabill*, L. R., 3 C. P. 264; *Pickering v. Ilfracombe Railway Co.*, id. 235; *Gill v. Continental Gas Co.*, L. R., 7 Ex. 619.

"A few courts in this country have carried the doctrine of *Dearle v. Hall* so far as to uphold the garnishment of a non-negotiable debt which had been equitably assigned without notice. We have already seen that this is not the law in England nor in Massachusetts. Neither is it the law of the United States generally. Drake on Attachments, ch. 24; *Cornick v. Richards*, 3 Lea. 1. The Supreme Court of Tennessee in that case refused to extend the rule to shares of stock, though it applies in that State to *choses in action*. As shares are not *choses in action*, and as attaching creditors are not purchasers, *Dearle v. Hall* is not in point.

"6. It remains only to cite two decisions of the Supreme Court, which in principle, are

Roosevelt v. Doherty.

decisive of this case. In *Bank v. Danter*, 11 Wall. 309, a National bank was required to make good to the holder of an unrecorded certificate the value of his shares, although they had been transferred on the books to a subsequent purchaser for value. That purchaser, to be sure, was not before the court, but if his title was better than that of the plaintiff, the bank was justified in transferring the shares and would have had a perfect defense. *Dickinson v. Central Nat. Bank*, 129 Mass. 279; *Gill v. Continental Gas Co.*, L. R., 7 Ex. 232. If a purchaser for value could not hold against the holder of the unrecorded certificate, *a fortiori* of an attaching creditor.

"*Bullard v. The Bank*, 18 Wall. 589, is in the same line of thought. It decides that certificates of shares in National banks are so far negotiable or quasi negotiable, that a by-law of the bank, which undertakes to make them subject to the debt of the transferor to the bank itself, is void. On the same ground it was held that a by-law like that of the Eliot National Bank, if intended to give attaching creditors a better title than transferees who had not recorded their certificates, was void. *Sargent v. Marine Ry. Co.*, 9 Pick. 201. Here, again, the argument is *a fortiori*. If the bank cannot create a lien by its by-law, much less can it obtain one indirectly, by attachment, upon the construction of an ambiguous by-law.

ROOSEVELT V. DOHERTY.

(129 Mass. 301.)

Agency — factor — sale of his own and principal's goods — action by principal

If a factor sells his own goods and his principal's, for a gross sum, the principal cannot recover of the purchaser for his own goods.

ACTION for goods sold and delivered. The opinion states the facts. The defendant had judgment below.

R. Gray & H. W. Swift, for plaintiff.

F. S. Hesseltine, for defendant.

ENDICOTT, J. It appears from the report that the firm of Hills, Turner & Harmon were importers of and dealers in window and plate glass, and they made a contract in writing with the defendant to furnish the glass for a building, which he was about to erect in Boston, according to the specifications furnished by the architect, for the gross sum of \$688 in cash. The contract describes the quality and dimensions of the glass to be furnished, and the number of lights of each quality. Hills, Turner and Harmon were the selling agents for the plaintiff, in Boston, for plate glass, and the first four items of glass to be furnished, as specified in the contract, were plate glass, and belonged to the plaintiff, having been

Roosevelt v. Doherty.

consigned to the firm for sale. The remainder of the glass was furnished by the firm. The defendant had no knowledge that any of the glass belonged to the plaintiff.

We can have no doubt, that as between the firm and the defendant, this was an entire contract; it was to furnish the glass for the building for a specified sum of money. There was no price named in the contract for the several kinds and qualities of glass to be furnished; and it is immaterial that the quality of the several kinds of glass to be furnished was specified. The consideration being entire, there could be no distinct apportionment of the consideration between the different qualities of glass furnished. There were not two contracts, one for plate glass and the other for glass of different qualities, but one contract for all the glass thus furnished to the building. *Clark v. Baker*, 5 Metc. 452. The firm could not recover for any portion of the glass, but only on the entire contract, by which all the glass passed to the defendant. And the question to be considered here is, whether the plaintiff, as an undisclosed principal, can maintain an action against the defendant to recover the value of the plate glass belonging to him, included in the entire contract. We are of opinion that he cannot.

It is too well settled to require the citation of many authorities, that an undisclosed principal, whose goods are sold by a factor, may sue the purchaser for the price; and where the contract of sale is in writing, and made in the name of the factor, he may bring an action upon it. A sale by his agent is a sale by him. *Lerned v. Johns*, 9 Allen, 419, and cases cited.

In the case at bar, it does not appear that any instructions were given by the plaintiff in regard to the price, manner, or terms of sale of his goods. The factors therefore had the right to sell in such manner as would best promote the interests of their principal; and it is to be presumed that the plaintiff understood that they would sell according to the usual course of dealing in Boston, when goods are consigned to a factor for sale. *Dwight v. Whitney*, 15 Pick. 179. That a factor may sell on credit, and take a note in his own name from the purchaser, and if he uses due diligence he is not responsible, in case of loss by reason of the purchaser's failure, was settled in an early case. A factor also may, and often does, sell the goods of different principals in one sale, and has authority to take a note for the whole sum from the purchaser, and may hold the note for the benefit of his principals. *Goodenow v. Tyler*, 7

Roosevelt v. Doherty.

Mass. 36; 5 Am. Dec. 22; *Chesterfield Manuf. Co. v. Dehon*, 5 Pick. 7; 16 Am. Dec. 367; *West Boylston Manuf. Co. v. Searle*, 15 id. 225; *Hapgood v. Batcheller*, 4 Metc. 573; *Hamilton v. Cunningham*, 2 Brook. 350; *Corlies v. Cumming*, 6 Cow. 181; Beawes *Lex Merc.* (5th ed.) 45.

In *West Boylston Manuf. Co. v. Searle*, *ubi supra*, a factor sold the goods of two consignors in one sale, and took the note of the purchaser; and it was held that it operated as payment; that the factor had power to release it; and although he afterward indorsed it to one of the consignors, that no action could be maintained on the note by the indorsee; and the court said, "The factors having an unquestioned authority to take a negotiable note in their own name, and thereupon to cancel and discharge the simple contract debt, the note was rightly taken, and whether it was rightly held and retained by the factors as their own, or otherwise appropriated, was a question merely between them and their employers."

So a factor may sell his own goods with those of his principal, and take a note which includes the amount due for both, as in *Hapgood v. Batcheller*, 4 Metc. 573. In that case it appears that the factors had sold goods of the plaintiffs and some of their own in one sale, and had taken a note from the purchaser which included the amount due for the plaintiff's goods and their own; and it was said by the court, that the sales by the defendant were made in the usual manner, and the terms of credit were reasonable, and that the sales were at the risk of the principals. Accounts had been rendered to the plaintiff by the factors of the sale of the goods, a portion of the proceeds had been paid over, and the note in suit was given for the balance by the factors to the plaintiff. Before the note of the purchasers was due, they became insolvent, and it was held, that as a note for the balance of an account is only *prima facie* evidence of payment, the factors were not liable for so much of the note as included the debt of the insolvent purchaser. See, also, *Vail v. Durant*, 7 Allen, 408.

It is clear therefore that when a note is taken from a purchaser by a factor, for the sale of the goods of several consignors, or for the sale of the goods of one or more consignors and of the goods of the factor, one consignor cannot sue the purchaser for the value of his goods taken separately, although his goods were sold for a definite sum, capable of being ascertained, and which forms a distinct part of the consideration of the note. The note is payment

Roosevelt v. Doherty.

for the whole, it is a contract which the factor had the right to make, and upon which alone the purchaser is liable. The principal is thus deprived of his direct remedy against the purchaser for the separate price of his goods.

In the case at bar, Hills, Turner & Harmon were importers of and dealers in glass, as well as selling agents for the plaintiff, and they could sell their own goods with those of the plaintiff, in the same manner as they could sell the goods of several principals together. Having authority to do this, and thus mingle the plaintiff's goods with their own, they may make an entire contract with the purchaser for the goods so mingled. And this contract being entire, the remedy, as against the purchaser, must be upon the contract itself. The character of the contract precludes the plaintiff from suing separately for the value of his glass, to the same extent as he would have been precluded if a note had been given by the defendant in payment for the goods sold to him under the written contract. And although an undisclosed principal may maintain an action in his own name against one who has purchased his goods through a factor, yet the purchaser is entitled to all the equities and defenses he would have had, if the action had been brought in the name of the factor, for the principal has permitted his factor to act as the apparent principal in the transaction. *Huntington v. Knox*, 7 Cush. 371; *Barry v. Page*, 10 Gray, 398; *Locke v. Lewis*, 124 Mass. 1, 7; s. c., 26 Am. Rep. 631, and cases cited.

No case has been cited, in the very elaborate argument for the plaintiff, in which such an action as this has been maintained; but it is argued that the plaintiff's position is sustained by the only two cases which bear upon this point. *Corliss v. Cumming*, 6 Cow. 181; *West Boylston Manuf. Co. v. Searle*, 15 Pick. 225.

The case of *Corliss v. Cumming* is clearly distinguishable. There a factor sold cheese of one of his consignors on a credit of ninety days for a definite and distinct sum, and at the same time sold to the same purchaser cheese belonging to another consignor, and took from the purchaser a note payable to himself for both. As the note by the law of New York was not a payment, it was held that the factor had not made himself liable, for the principal might sue the purchaser for the price of his cheeses, which could be clearly ascertained, in the same manner as he might have done if no note had been taken.

A dictum of Chief Justice SHAW in *West Boylston Manuf. Co.*

Pierce v. O'Brien.

v. *Searls* is relied on by the plaintiff. "If," he says, "the principal is in a condition to declare on a contract for goods sold, treating the note as a nullity, or as a mere collateral security, not amounting to payment, he might probably recover in his own name." This, as a general proposition, may be correct, but as by our law a promissory note is *prima facie* payment, the principal cannot recover for goods sold, where such a note has been given in payment for his goods.

We are therefore of opinion that the presiding judge correctly ruled that the contract made by the defendant was an entire contract for a gross sum; and that the plaintiff had no right to sever the same and maintain an action in his own name, and subject the defendant to a separate suit for the value of the plate glass belonging to him and included in the contract of sale.

Judgment on the verdict.

PIERCE V. O'BRIEN.

(129 Mass. 314.)

Conflict of law — foreign assignment.

A voluntary assignment, by a debtor residing in another State, of property in Massachusetts, for the benefit of creditors, is postponed to a subsequent attachment by a non-assenting creditor residing in Massachusetts*.

CONVERSION. The opinion states the case.

O. B. Mowry, for plaintiff.

G. E. Smith, for defendant.

COLT, J. This is an action of tort for the conversion of personal property, attached in this State by a Massachusetts creditor as the property of a resident of Rhode Island. By the laws of Rhode Island, the assignment under which the plaintiff claims is valid as against creditors in that State. It is an assignment of all the debtor's property, both real and personal, to the plaintiff, in trust

* See *Patne v. Lester* (44 Conn. 196), 26 Am. Rep. 443; *Chafee v. Fourth Nat. Bk. of N. Y.* (71 Me. 514), 36 Am. Rep. 345.

for the benefit of his creditors. The plaintiff came to this Commonwealth and took possession, under the assignment, of the property in question before it was attached. But at the time of the attachment, no creditor had become a party to the assignment, or had assented to it; and the only consideration for it was the plaintiff's acceptance of the trust.

The question is how far our courts are bound to recognize assignments of this kind made in other States as against our own citizens claiming to hold by attachment property found in this Commonwealth. The question is clearly settled by the decisions.

Independently of insolvent laws, or assignments for the benefit of creditors authorized by statute, it has always been held by this court that voluntary assignments by a debtor in this Commonwealth in trust for the payment of debts, and without other adequate consideration, are invalid as against an attachment, except so far as assented to by the creditors for whose benefit they were made. *Edwards v. Mitchell*, 1 Gray, 239; *May v. Wannemacher*, 111 Mass. 202. The assent of creditors is not presumed, but must be shown by some affirmative act, such as presenting claims, or becoming parties to the written assignment. *Russell v. Woodward*, 10 Pick. 408, 413. Such assignments made by judicial or legislative authority in another State are not held binding here. *Taylor v. Columbian Ins. Co.*, 14 Allen, 353. And an assignment made by the debtor himself in another State, which if made here, would be set aside for want of consideration, will not be sustained against an attachment by a Massachusetts creditor, although valid in the place where it is made. There is no comity which requires us to give force to laws of another State which directly conflict with the laws of our own, or to allow to the act of a debtor resident in another State an effect in disposing of his property, as against his creditors here, which it would not have if he lived in Massachusetts. *Zipcey v. Thompson*, 1 Gray, 243; *Swan v. Crafts*, 124 Mass. 453; *Osborn v. Adams*, 18 Pick. 245; *Fall River Iron Works v. Croade*, 15 id. 11. In the language of Mr. Justice MORTON in the case last cited, "Assignments by insolvent debtors in trust to pay their debts, either in a specified order or *pro rata*, are not deemed of sufficient validity to protect the assigned property from the attachments of the creditors of the assignor. There is no adequate consideration; and without this, no insolvent debtor can so dispose of his property as to place it beyond the reach of his cred-

 Lawrence Manufacturing Co. v. Lowell Hosiery Mills.

itors. The validity of such assignments must depend upon the assent of the creditors." "If they decline or omit to join in the assignment, there are no *cestui que trusts*, and so no trusts to be executed, and the consideration entirely fails."

The subsequent assent of the Rhode Island creditors to this assignment, manifested by proving their claims under it, cannot defeat the title to this property which the creditor in Massachusetts acquired by his attachment. *Bradford v. Tappan*, 11 Pick. 76; *Ward v. Lamson*, 6 id. 358.

Judgment for the defendant.

 LAWRENCE MANUFACTURING COMPANY V. LOWELL HOSEY MILLS.

(129 Mass. 835.)

Trade-mark — figures with device.

The figures "528," on hosiery, in combination with a wreath and an eagle, and used to denote the grade and the origin of the manufacture, are a valid trade-mark. (*See note, p. 865.*)

BILL to restrain use of trade-mark and for compensation. The opinion states the case.

L. M. Sargent, for plaintiff.

G. F. Richardson (*D. S. Richardson* with him), for defendant.

COLT, J. This is a bill in equity, to restrain the defendant from using the plaintiff's trade-mark, and for compensation for the injury occasioned by such use. It was heard by a single justice of this court, upon the pleadings and proofs. The judge was of opinion that the plaintiff was entitled to the relief prayed for, and reported the case for the consideration of the full court.

The alleged trade-mark of the plaintiff consists of the figure of an eagle, surmounting a wreath formed of the branches of the cotton plant. The wreath incloses the words "Lawrence Manufacturing Company" printed in a circle, having underneath it the word

Lawrence Manufacturing Co. v. Lowell Hosiery Mills.

“trade-mark,” and below all, the figures “523,” printed in large hollow block numerals. This device had been stamped for many years on hosiery of a certain grade, and was known and recognized as indicating that the goods so marked were of the plaintiff’s manufacture. Before this, the plaintiff had used an eagle and scroll in combination with other numerals as a trade-mark, upon the same grade of hosiery; and the wreath and eagle of the present device, without the numerals 523, or any other numerals, had been previously used on other grades of its goods.

The stamp adopted by the defendant, in alleged imitation of the plaintiff’s stamp, consists of an eagle surmounting a double circle or garter, on which are printed the words “extra finish iron frame,” and beneath which are the figures “523,” printed in large hollow block numerals, of the size and description used by the plaintiff, and occupying the same position with reference to other parts of the device. This stamp the defendant has placed upon hosiery goods made by it for the purpose of imitating the plaintiff’s stamps, and in order that such goods might be supposed to be of the plaintiff’s manufacture; and it was found by the judge that the plaintiff’s customers had been misled and deceived thereby. The eagle and garter were used by the defendant before the alleged trade-mark of the plaintiff was adopted; and at the argument, the plaintiff made no claim to the exclusive use of them, when not combined with the numerals “523.”

The only question presented upon this report therefore is whether the plaintiff’s stamp, including the figures, constitutes such a trade-mark as the law will protect. The statutes of this Commonwealth protect a person who uses any peculiar name, letters, marks, devices or figures upon an article manufactured or sold by him, to designate it as an article manufactured by him. Gen. Sts., ch. 56, § 1. It has been said that there can be no exclusive right to use marks, figures and letters which are intended merely to indicate the quality of the fabric manufactured, as distinguished from those marks which are intended to indicate its origin, because one has no right to appropriate a sign or symbol or mark, which from the nature of the fact it is used to signify, others may use with equal truth, and therefore have an equal right to employ for the same purpose. *Manuf. Co. v. Trainor*, 101 U. S. 51. And in *Canal Co. v. Clark*, 13 Wall. 311, it was declared by Mr. Justice STRONG that no one can claim protection for the exclusive use of a mark which

Lawrence Manufacturing Co. v. Lowell Hosiery Mills.

would practically give him a monopoly in the sale of any goods other than those of his own manufacture. See also, *Gilman v. Hunnewell*, 122 Mass. 139. Letters and figures, when used only for the purpose of denoting quality, are from the very nature of the use incapable of exclusive appropriation.

These considerations would be decisive, if the plaintiff here claimed the exclusive right to the numerals "523," when used only to indicate the quality, and not with reference to the origin of the goods. But such is not the plaintiff's position. Its claim is that the purpose of using these figures in connection with the other parts of its trade-mark was to aid the buyer in distinguishing its goods from similar goods made and sold by others.

A trade-mark when applied to manufactured articles may well consist of the name and address of the manufacturer, with the addition of some peculiar device or emblem, some curious forms or figures, so disposed as to attract attention, impress the memory, and advertise more effectually the origin of the article to which it is attached. This affords a wide field for ingenuity in producing designs, which the increasing variety of modern trade-marks shows is not wholly neglected, and it may be that even numerals or letters of the alphabet can be combined and printed in such unusual and peculiar forms that the result would be quite sufficient for use as a trade-mark. The difficulty of giving to bare numbers the effect of indicating origin or ownership, and of showing that the numbers used were originally designed for that purpose, was recognized in *Boardman v. Meriden Britannia Co.*, 35 Conn. 402. But it was said in that case that if once shown to have been used for that purpose, and to have had that effect, it would not be easy to assign a reason why they should not receive the same protection as trade-marks. The numbers in that case were, however, associated with the name of the plaintiffs, and with the form, color and general arrangement of the labels used; and were held by virtue of that connection to form an important part of the trade-mark itself. See also *Gillott v. Esterbrook*, 48 N. Y. 374; s. c., 8 Am. Rep. 553; *Glen & Hall Manufacturing Co. v. Hall*, 61 N. Y. 226; s. c., 19 Am. Rep. 278; *Kinney v. Allen*, 1 Hughes, 106; *Ransome v. Bentall*, 3 L. J. (N. S.) Ch. 161.

In coming to his conclusion, the judge who heard the present case found that the plaintiff adopted and used the numerals "523" as part of its trade-mark; and this finding is supported by the

Lawrence Manufacturing Co. v. Lowell Hosiery Mills.

evidence. It appears that these figures were selected arbitrarily; that they were of unusual and distinctive form; that they were added to the original device, consisting of the eagle, the wreath and the plaintiff's name, at the time when the word "trade-mark" was also added; and that the whole, so composed, has been used as one trade-mark ever since. This mark was recognized and known as the plaintiff's mark, and goods so marked were described and called for as "523's."

The defendant's imitation was produced by using the same figures, printed in the same style, and placed as to the other parts of the device in the same relative position as the plaintiff's. These numerals constituted one of the most prominent features in the plaintiff's design, and when used in connection with the rest of the defendant's mark, were calculated to aid in deceiving the public.

It is not necessary that the resemblance produced should be such as would mislead an expert, or such as would not be easily detected if the original and spurious were seen together. It is enough that such similitude exists as would lead an ordinary purchaser to suppose that he was buying the genuine article and not an imitation. *McLean v. Fleming*, 96 U. S. 245; *Gorham Co. v. White*, 14 Wall. 511; *Metzler v. Wood*, 8 Ch. D. 606.

The imitation in this case accomplished the result intended; and the entry must be decree for the plaintiff.

Decree for the plaintiff.

NOTE BY THE REPORTER.—See *Lichtenstein v. Mellis*, 8 Oreg. 464; s. c., 34 Am. Rep. 503 and note, 508.

In *Avery v. Mettle*, Louisville (Ky.) Chancery Court, a permanent injunction has been refused to restrain the defendant's use of the same numbers and letters used by the plaintiff, to denote the pattern, size and character of plows. The court said: "Now it seems to be the clearly-settled law that the letters of the alphabet and the numerals of arithmetic are the common property of mankind, and cannot in their ordinary forms and functions be appropriated by any one to his exclusive use as trade marks. No one can acquire an exclusive right to use letters or numerals for any purpose, and thus prohibit the use of them to others. The newspaper or book publisher has the right to use the same kind of type as his rival uses. School-books may be printed in letters of small and large type, beginning with single letters and developing the progress of the pupil by syllables, words, sentences, and compositions, and unless the book be copyrighted, any one may copy or reprint the whole or any part of it. There is a limit to this common freedom, and it is well defined. Every person is entitled to the exclusive use of such letters in such combination as compose his name, and no one will be allowed to use those letters when singly or in combination they have acquired this signification. It is upon this principle that letters standing as the initials of and representing a name, or composing a full name, are capable of being valid trade-marks and are protected as such. In that meaning they denote the origin of the article upon which they are marked; they point to the maker or vender; they represent his signature, his certificate of the fact that the article comes from him. But when the letters do not signify the name of the maker, but by gen-

Wood v. Boylston National Bank.

eral use signify size or quality, the fact so expressed may be as true of one article as of another, and may be stated by one maker as well as by another, by the same method of expression. And when numbers or numerals are used to express size or qualities, then again the same facts may be expressed by the same means with equal truth by all persons. These principles are founded in the rights of mankind to share in the knowledge which is open and common to all, and these principles have been stated with great clearness in cases of the highest authority. *Amoskeag Manufacturing Co. v. Speer*, 2 Sandf. 500, and *Manufacturing Co. v. Trainor*, 11 Otto, 51. The cases which are mainly relied on for plaintiff as establishing the right to appropriate numerals as valid trade-marks are not in my opinion in conflict with the general doctrine announced in the leading case *supra*. It is true that in *Gillott v. Esterbrook*, 48 N. Y. 374, the numeral 303 was held to be a valid trade-mark, and in *Boardman v. Britannia Co.*, 35 Conn. 402, No. 2,340 was held to be a valid trade-mark; but in both cases the ground upon which these numerals were sustained was, they were arbitrary signs; that they did not express size, quality or quantity; that being unmeaning in their connection with the articles upon which they appeared, they were symbols of a name. And both cases expressly approve the great case of Judge Dunn in 2 Sandf., *supra*."

WOOD V. BOYLSTON NATIONAL BANK.

(120 Mass. 353.)

Agency—collection by attorney through bank—appropriation by bank to attorney's debt—action by principal.

An attorney at law, being intrusted with a note for collection, deposited it in a bank for collection, without stating on whose account. The bank collected it and applied the amount on a debt of the attorney to the bank. The attorney becoming bankrupt, the bank made a settlement with his assignee including the amount of the note. A year afterward, but as soon as he learned of the collection of the note, the owner demanded the proceeds of the bank, which being refused, he brought suit therefor. *Held*, not maintainable.

ACTION for money had and received. The opinion states the facts. The plaintiff had judgment below.

F. W. Griffin, for plaintiff.

H. G. Allen (*N. Morse* with him), for defendant.

COLT, J. The plaintiff was the owner of the note, the avails of which he seeks to recover in this action. It was a negotiable note, indorsed in blank by the payee. Before it fell due, the plaintiff delivered it to Abraham Jackson, an attorney at law, for collection, and he deposited it, without his own indorsement, in the defendant

Wood v. Boylston National Bank.

bank, where he kept an account, for collection. At the time the note was left with the bank, and at the time of its maturity and payment, Jackson was owing the bank, for advances and otherwise, more than the amount of the note. Nothing was said when it was deposited, or before its payment, as to Jackson's title or relation to the note, and no advance of money was made to him on account thereof.

The bank credited Jackson's account with the amount of it when paid, on May 12, 1875, and applied the balance of his account to the payment of his debts to the bank. He was afterwards on June 4, 1875, adjudicated a bankrupt; and the bank, on September 30, 1876, made a settlement with his assignees, crediting the amount of this note, and receiving but a part of the whole claim. The plaintiff on September 20, 1877, as soon as he knew that the bank had received the proceeds of the note, made a demand upon the bank for the amount collected.

It is contended that there is nothing, on these facts, which shows that Jackson actually pledged, or intended to pledge, this note as security for his debt to the bank, or do more than give it to the bank to collect as agent for the plaintiff. But the effect of the transaction, as between Jackson and the bank, is to be determined by the application of well-settled legal principles. Jackson was ostensible owner of the note. He delivered it to the bank in the usual course of business, with no notice expressed, or to be implied from the circumstances, that it was sent for collection only, or that any one else had any interest in it. No instructions as to the application of the proceeds were given. He knew that in the regular course of business, it would be credited to his general account, to be availed of in that way as security to the bank. It has long been settled that a banker who has advanced money to another has a general lien on all securities of the latter which are in his hands, for the amount of his general balance, unless such securities were delivered to him under a particular agreement limiting their application. *Bank of Metropolis v. New England Bank*, 1 How. 234, and 6 id. 212; *Sweeny v. Easter*, 1 Wall. 166; *Barnett v. Brandão*, 6 Man. & Gr. 630, and 3 C. B. 519. One who takes a negotiable promissory note before maturity, as security for a pre-existing debt, is by the law of this State a holder for value. *Culver v. Benedict*, 13 Gray, 7. Such being the law, the bank received the note, undertook its collection and applied the proceeds; and the unknown

Davis v. Central Congregational Society of Jamaica Plain.

owner of it, who gave it to Jackson with all the appearance of title in him, cannot be permitted to defeat the right of the bank, who, long before it had knowledge of the claim, had applied the same to the payment of Jackson's debt, and settled with his assignees in bankruptcy. See *Locke v. Lewis*, 124 Mass. 1 ; s. c., 26 Am. Rep. 631, and cases cited.

The case of *Lawrence v. Stonington Bank*, 6 Conn. 521, decided in 1827, and other cases of the same class are plainly distinguishable from the one at bar. That was an action for the proceeds of a draft which had passed through a number of banks for collection merely; when received by the Stonington Bank, it was accompanied by a letter from the Eagle Bank, stating that it was for collection. The Stonington Bank knew of the failure of the Eagle Bank before the draft was paid. It gave no credit for or on account of it, and made no settlement with the Eagle Bank prior to actual notice of the plaintiff's title to the draft, and suffered no prejudice. In all cases of that class, we believe it will be found, on examination, that the bank had notice, actual or constructive, of the other party's claim, or had suffered no loss by reason of the delay in making known the claim.

Judgment for the defendant.

DAVIS V. CENTRAL CONGREGATIONAL SOCIETY OF JAMAICA PLAIN.

(129 Mass. 857.)

Negligence — dangerous premises — invitation.

A religious society giving public notice of a meeting to be held at its church and inviting members of other societies to attend, is liable to one so invited and attending, for a personal injury sustained by him by means of the dangerous condition of the premises.

SUFFICIENTLY reported in note, 34 Am. Rep. 233.

Stoddard v. Ham.

STODDARD V. HAM.

(129 Mass. 383.)

Sale — in fact, through supposed agent.

If one sells goods in fact to a second, supposing that the sale is really to a third through the second as his agent, and solely in reliance on the third, although the second sells them to the third, the first cannot recover therefor from the third.

CONVERSION. The goods in question had been sold to defendant by Leonard. The opinion shows the other facts.

S. H. Tyng, for plaintiffs.

N. Morse, for defendant.

COLT, J. This case was tried without a jury, and there is no reason to doubt that upon the facts found by the judge, it was correctly ruled that the plaintiffs could not recover in tort for the conversion of the property in dispute.

It is not enough to give the plaintiffs a right to recover, that they supposed they were selling bricks to the defendant, through Leonard his agent, and that they would not have sold them to Leonard on his sole credit. The judge found that they were in fact sold to Leonard. There was no fraud, no false representation of agency, or pretense on the part of Leonard that he was buying for any one else. He was a commission merchant, who was in the habit of purchasing goods on his own account, and who honestly bought the bricks for himself, and sold them to the defendant as his own. It was not a case of mistaken identity. The plaintiffs knew that they were dealing with Leonard; they did not mistake him for the defendant; nothing was said as to any other party to the sale. The conclusion is unavoidable that the contract was with him. The difficulty is, that the plaintiffs, if they had any other intention, neglected then to disclose it. It was a mistake on one side, of which the other had no knowledge or suspicion, and which consisted solely in the unauthorized assumption that Leonard was acting as agent for a third person, and not for himself.

It is elementary in the law governing contracts of sale and all

other contracts, that the agreement is to be ascertained exclusively from the conduct of the parties and the language used when it is made, as applied to the subject-matter and to known usages. The assent must be mutual, and the union of minds is ascertained by some medium of communication. A proposal is made by one party and is acceded to by the other in some kind of language mutually intelligible, and this is mutual assent. Met. Cont. 14. A party cannot escape the natural and reasonable interpretation which must be put on what he says and does, by showing that his words were used and his acts done with a different and undisclosed intention. *Foster v. Ropes*, 111 Mass. 10, 16; *Daley v. Corney*, 117 id. 288; *Wright v. Willis*, 2 Allen, 191; 2 Chit. Cont. (11th Am. ed.) 1022. It is not the secret purpose, but the expressed intention, which must govern, in the absence of fraud and mutual mistake. A party is estopped to deny that the intention communicated to the other side was not his real intention. To hold otherwise would be to put it in the power of the vendor in every case to defeat the title of the vendee, and of those holding under him, by proving that he intended to sell to another person, and so there was no mutual assent to the contract.

In *Boston Ice Co. v. Potter*, 123 Mass. 28; s. c., 25 Am. Rep. 9, cited by the plaintiffs, there was no privity of contract established between the plaintiff and the defendant. There was no evidence afforded in the conduct and dealings of the parties, that the defendant assented to any contract whatever with the plaintiff. A stranger attempted to perform the contract of another party with the defendant.

In *Hardman v. Booth*, 1 H. & C. 803, there was abundant evidence that the contract was with another party, to whom the goods were sent, and not with the person who obtained possession of them and sold them to the defendant. In *Mitchell v. Lapage*, Holt's N. P. 253, the goods were expressly bought of a firm, which, without the knowledge of the broker, had been dissolved by the withdrawal of two of its members.

We are referred to no case which supports the claim here made by the plaintiffs.

Judgment for the defendant.

Pierce v. Boston Five Cents Savings Bank. Turner v. Estabrook.

PIERCE v. BOSTON FIVE CENTS SAVINGS BANK. TURNER v. ESTABROOK.

(129 Mass. 495.)

Gift — savings-bank deposit — trust — debt of estate to donee.

In view of death, A. delivered to B. a sealed package containing a sum of money and savings-bank books, and a writing signed by him, stating where he wished to be buried, and directing that the balance, after paying all bills and expenses, should be divided among specified persons, at the same time telling B. of the contents and generally of the directions. *Held*, a valid gift *causa mortis* in trust.*

The gift of a savings-bank book, *causa mortis*, carries the deposit without any assignment.

If the donee is a creditor of the estate, and the only one not paid, it is no defense that his debt cannot be paid without including the deposit in the assets.

ACTION to recover savings-bank deposit, and bill of interpleader to determine ownership of bank books and money. The opinion shows the facts.

O. Stevens, for administrator.

Z. S. Arnold, for other defendants.

ENDICOTT, J. It has been repeatedly held that a deposit in a savings bank may be the subject of a valid *donatio causa mortis*, as well as of a gift *inter vivos*, and that such a gift may be proved by the delivery of the bank book to the donee, or to a third person for the donee, accompanied by an assignment. *Kingman v. Perkins*, 105 Mass. 111; *Foss v. Lowell Five Cents Savings Bank*, 111 id. 285; *Kimball v. Leland*, 110 id. 325; *Sheedy v. Roach*, 124 id. 472; s. c., 26 Am. Rep. 680; *Davis v. Ney*, 125 Mass. 590; s. c., 28 Am. Rep. 272.

As there can be no manual delivery of the credit which the donor has in the bank, the delivery of the book, which represents the deposit, and is the only evidence in the possession of the donor of his contract with the bank, together with an order or assignment, operates as a complete transfer of the existing fund, and is all the delivery of which the subject is capable.

* See *Gerrish v. New Bedford Inst. for Savings* (128 Mass. 159), 35 Am. Rep. 865.

Pierce v. Boston Five Cents Savings Bank. Turner v. Estabrook.

We have not had the question presented to us until now, whether the delivery of the book, without a written assignment or order, is sufficient to constitute a valid gift *causa mortis* or *inter vivos*. The question has however been decided in other jurisdictions in the affirmative.

It was held in *Parish v. Stone*, 14 Pick. 198 ; 25 Am. Dec. 390. that the donors' own note, payable to the donee, was not the subject of a *donatio causa mortis*. But it was intimated in the opinion that a promissory note of another person payable to bearer, or indorsed in blank, so as to pass by delivery, might be a good gift *causa mortis*, and that a mortgage given to secure it would pass as an inseparable incident to the debt, though not assigned, citing *Duffield v. Elwes*, 1 Bligh N. R. 497, and *Duffield v. Hicks*, 1 Dow. & Cl. 1. See also, *Runyan v. Mersereau*, 11 Johns. 534; 6 Am. Dec. 393; *Chase v. Redding*, 13 Gray, 418; *Ford v. Stuart*, 19 Johns. 342.

In *Grover v. Grover*, 24 Pick. 261, the action was by an administrator, on a promissory note, which, as appears by the statement of facts, was secured by a mortgage. The note and mortgage were given by the plaintiff's intestate to one Blanchard, in contemplation of death, without assignment. It was held that there may be a valid gift *inter vivos* of a promissory note, payable to the order of the donor, without indorsement or other writing by him. And it was said by Mr. Justice WILDE, in delivering the opinion, after reviewing the earlier English cases, "In coming to this conclusion, we concur with the decision in the case of *Wright v. Wright*, 1 Cow. 598, wherein it was held that the gift and delivery over of a promissory note, *mortis causa*, is valid in law, although the legal title did not pass by the assignment." See *Harris v. Clark*, 3 Comst. 93. It was also decided that Blanchard, on the death of the donor, could maintain an action against the maker of the note in the name of the administrator, without his assent. It was not necessary to decide whether the gift of the mortgage security was valid, as the right to maintain the action did not depend upon that question, though *Duffield v. Elwes* was referred to as deciding that the gift of the debt operated as an equitable assignment of the mortgage.

In *Sessions v. Moseley*, 4 Cush. 87, it was said that "a note of hand of a third person, a security for money, or a chose in action, however it may have formerly been considered, is now held to be the proper subject of such a gift." And in *Bates v. Kempton*. ?

Pierce v. Boston Five Cents Savings Bank. Turner v. Estabrook.

Gray, 382, it was decided, on the authority of these cases, that by the law of Massachusetts, a negotiable note is the proper subject of such a gift without indorsement, and that the donee may maintain an action on it in the name of the administrator of the donor without his consent. See also *Borneman v. Sidlinger*, 15 Me. 429. So the delivery of bonds, or a policy of life insurance with the deposit note, have been held to constitute good gifts *mortis causa* without assignment of the instruments. *Snelgrave v. Baily*, 3 Atk. 214, per Lord HARDWICKE; *Witt v. Amis*, 1 B. & S. 109; *Wells v. Tucker*, 3 Binn. 366; *Waring v. Edmonds*, 11 Md. 424.

The decision of Lord HARDWICKE in *Ward v. Turner*, 2 Ves. Sen. 431, in which he held that the mere delivery of receipts for South Sea annuities was not sufficient to constitute a good gift *causa mortis*, distinguishing it from the case of *Snelgrave v. Baily*, was said by Mr. Justice WILDE, in *Grover v. Grover*, to be technical and satisfactory, and to have no application to our laws, which place bonds and other securities on the same footing. In *Westerlo v. De Witt*, 36 N. Y. 340, the delivery of a certificate of deposit on the New York Life Insurance and Trust Company was held to be effectual, without a written assignment, to transfer the deposit itself to the donee as a *donatio causa mortis*. So a delivery to a donee of a savings-bank book containing entries of deposits to the credit of the donor, with the intent to give the donee the deposits represented by the book, has been held to constitute a complete gift of such deposits, and that such delivery vests the equitable title in the donee without assignment. *Hill v. Stevenson*, 63 Me. 364; s. c., 18 Am. Rep. 231; *Tillinghast v. Wheaton*, 8 R. I. 536; s. c., 5 Am. Rep. 621; *Camp's Appeal*, 36 Conn. 88; s. c., 4 Am. Rep. 39; *Penfield v. Thayer*, 2 E. D. Smith, 305.

A savings-bank book has a peculiar character. It is not a mere pass-book, or the statement of an account; it is issued to the person in whose name the deposit is made, and with whom the bank has made its contract; it is his voucher, and the only security he has, as evidence of his debt. The bank is not obliged to pay to the depositor the money in its hands except upon presentation of the book; and if in good faith and without notice, it pays the money deposited to the person who presents the book, although the book has been obtained fraudulently by him, the bank is not liable to the real depositor. *Sweeney v. Boston Five Cents Saving Bank*, 116 Mass. 384; *Wall v. Provident Inst. for Savings*, 3 Allen, 96; *Lerry*

Pierce v. Boston Five Cents Savings Bank. Turner v. Estabrook.

v. *Franklin Savings Bank*, 117 Mass. 448; *Goldrick v. Bristol County Savings Bank*, 123 id. 320.

The book is the instrument by which alone the money can be obtained, and its possession is thus some evidence of title in the person presenting it at the bank. It is in the nature of a security for the payment of money; it discloses the existence and amount of the fund to the person receiving it, and affords him the means of obtaining possession of the same. We can have no doubt that a purchaser, to whom such a book is delivered without assignments obtains an equitable title to the fund it represents; and a title by gift, when the claims of creditors do not affect its validity, stands on the same footing as a title by sale. *Grover v. Grover*, 24 Pick. 261.

In the first of the cases now before us, the delivery of the bank book to Munroe, by Green, in his last sickness, without a written assignment, made in contemplation of death, and with the intent thereby to transfer the deposit in the bank to Munroe, constituted a valid *donatio mortis causa*, and Munroe may maintain an action against the bank for the amount of the deposit, in the name of Green's administrator, without his consent.

The judge properly refused to rule, upon the facts presented, that the gift to Munroe made the estate insolvent, and was therefore void because in fraud of creditors.

It is true that a gift *mortis causa* cannot avail against creditors. In such case the donee is in the same position as legatees and heirs, for strictly speaking the only property which a person by gift *causa mortis* or by will can voluntarily dispose of, without consideration, is the balance left after the payment of his debts. Munroe therefore, as donee *causa mortis*, took his title to the bank deposit subject to the right of the administrator to reclaim it, if required for the payment of debts. *Mitchell v. Pease*, 7 Cush. 350; *Chase v. Redding*, 13 Gray, 418. But, upon the facts in this case, Munroe is the only person against whom, as creditor, the gift would be void, and it cannot be said to be a fraud as against him.

It appears that Pierce was appointed administrator in January, 1877, and that the estate of Green, not including the deposits in the bank, amounted to \$642.87. This action was brought in June, 1877. In January, 1879, Munroe brought an action against the administrator, alleging that Green's estate was indebted to him in the sum of \$1,300, for board of Green and other expenses paid for

Pierce v. Boston Five Cents Savings Bank. Turner v. Estabrook.

him. Pierce thereupon represented the estate as insolvent in October, 1879, and commissioners were appointed, but no further action seems to have been taken. The only debts besides the claim of Munroe amounted to \$25 for the doctor's bill during Green's last sickness, and forty cents for some tobacco, which have both been paid. The funeral and other expenses did not exceed \$150, but these are not debts within the meaning of the statute in regard to the settlement of the estates of deceased persons. The expenses of the funeral, and of the last sickness, and the expenses attending the administration, we must presume to have been paid before the estate was declared insolvent. The doctor's bill would come within this category. Gen. Stats., ch. 99, § 1. Munroe therefore was the only creditor. If he should establish his claim against the estate for \$1,300, he would be entitled only to what remains of the \$642.87 after the above payments, and could make no claim against the administrator for funds in his own hands, by virtue of the gift from Green. It would be an idle ceremony to have the bank deposit paid over to Pierce, the administrator, in order that he should deduct from it the claim of Munroe, pay him, and also return to him the balance.

As we understand the bill of exceptions, by the terms of the contract upon which the deposit was held by the defendant, the rate of interest thereon is four per cent per annum, payable semi-annually. This action is brought upon that contract, and the damages for the non-payment of the money are to be estimated at that rate, till the debt is merged in the judgment. *Brannon v. Hursell*, 112 Mass. 63; *Union Institution for Savings v. Boston*, 129 Mass. 82; *Miller v. Burroughs*, 4 Johns. Ch. 436; *Van Beuren v. Van Gaasbeck*, 4 Cow. 496. The ruling of the presiding judge, that the plaintiff was entitled to six per cent from the date of the writ was erroneous. If the plaintiff will remit the two per cent erroneously included in the verdict, the exceptions may be overruled.

Exceptions overruled.

In the second case, the delivery to the plaintiff by Miss Howe of the sealed package containing \$250 in money and four bank books, accompanied by directions as to the disposition of the same in case of her death, thus manifesting her intention of making a final disposition of the property contained in the package, was a valid *donatio mortis causa*; and the plaintiff held the same in trust after

Manufacturers' National Bank v. Thompson.

the death of the donor, upon the terms and limitations prescribed by the donor. *Clough v. Clough*, 117 Mass. 83; *Shedy v. Roach*, 124 id. 472; s. c., 26 Am. Rep. 680. In the opinion of the majority of the court, the donor had the right thus to dispose of this particular property. The plaintiff knew that the package contained money and bank books; and it is immaterial that she did not know the amounts due upon the books, or the names of the banks which held the several deposits. She is bound to dispose of the money, and the deposits in the banks represented by the books, as directed by the donor, subject to any claim the administrator may have for the payment of debts and necessary expenses of administration. *Mitchell v. Pease*, 7 Cush. 350; *Chase v. Redding*, 13 Gray, 418; *Davis v. Ney*, 125 Mass. 590; s. c., 28 Am. Rep. 272.

The terms of the decree must be settled before a single judge.

Decree accordingly.

MANUFACTURERS' NATIONAL BANK V. THOMPSON.

(189 Mass. 438.)

Bank — mistake — erroneously stamping note "paid" — clearing-house.

Bank A. having discounted a note, sent it through the clearing-house for payment, charging it to bank B. at which it was payable. The teller of the latter bank, erroneously supposing the maker was in funds, stamped it "paid." The mistake being discovered, the other bank and the indorser were notified of it before the close of banking hours, and the note was duly protested. Bank B. afterward paid it to bank A., and sued the indorser. *Held*, maintainable.

ACTION on promissory note. The opinion states the case. The plaintiff had a verdict.

B. E. Perry and *S. W. Creech, Jr.*, for defendants.

J. D. Ball, for plaintiff, was not called upon.

COLT, J. This action is against the indorsers of a promissory note, which was made payable at the plaintiff bank, and which was discounted by the Faneuil Hall Bank. When it became due, the

Manufacturers' National Bank v. Thompson.

last-named bank charged it to the plaintiff bank, and sent it through the clearing-house for payment. The plaintiff's teller, by mistake, thinking that the makers were in funds at his bank, stamped the word "paid" on the face of the note. The mistake was soon discovered, and before the close of banking hours on the same day, both the other bank and the indorsers were notified of it, and the note was duly protested.

There was then a dispute between the banks, as to whether, under the rules of the clearing-house, the plaintiff was not bound to return the note, if not paid, by a given hour of the day in which it was due; and it was contended, that as the note was not so returned, it had become the property of the plaintiff. This dispute was terminated by a payment to the Faneuil Hall Bank of the amount of the note, which was made by the plaintiff expressly without any waiver of its legal rights; and at the trial, the Faneuil Hall Bank disclaimed all title or interest in the note.

The case was tried without a jury, and the judge found that the note was stamped by mistake as paid; that this act of stamping, with the failure to return it, did not amount to payment of the note, and was not intended as such; and that the money paid by the plaintiff to the other bank was not intended and did not operate as a payment of the note. He also found that the plaintiff had sufficient title and ownership of the note to enable it to bring this action.

Two questions only are presented. The first is, whether the evidence would justify the judge in finding that the note was not paid; and next, whether it would justify him in finding that the plaintiff was entitled to bring this action.

As to the first, there is no pretense that the note has ever been paid by the makers or indorsers, and there is nothing in the rules of the clearing-house association, which the defendants, as indorsers of the note, can set up by way of forfeiture or estoppel to defeat the right of the holder to recover against them. The rules of the association are adopted solely for the purpose of facilitating exchanges among the banks. The defendants are not members or parties to its regulations, and whatever effect is to be given to them as between the banks, the defendants are not in a situation to claim the benefit of them. *Overman v. Hoboken City Bank*, 1 Vroom, 61. There was no evidence that the defendants, as indorsers of the note, suffered any loss, or changed their situation, in respect to the makers of the

Commonwealth v. Gray.

note, by the mistake of the plaintiff. The note was regularly protested, and notice to the indorsers given. Their rights were in no way prejudiced. *Merchants' National Bank v. National Eagle Bank*, 101 Mass. 281; *Troy City Bank v. Grant*, Hill & Denio, 119. See also *Whiting v. City Bank*, 77 N. Y. 363. The finding of the court that the note is still an outstanding unpaid note was therefore clearly right.

Nor is there any doubt that the judge properly found and ruled that the plaintiff had sufficient title to maintain this action. The note was indorsed in blank, and passed by delivery. The plaintiff is in possession of it, and even if the Faneuil Hall Bank is regarded as the real party in interest, yet it is settled that an action may be maintained in the name of the holder of such a note who came into possession of it with the assent of the party in interest. *Beckman v. Wilson*, 9 Metc. 434; *National Pemberton Bank v. Porter*, 125 Mass. 333; s. c., 28 Am. Rep. 235; *Spofford v. Norton*, 126 Mass. 533. But the evidence here shows that the plaintiff has both the legal and beneficial interest as sole owner. No one else claims any interest in it. The transaction shows that it was intended by the Faneuil Hall Bank, on receiving the amount paid by the plaintiff, to leave the note in the hands of the latter as a valid existing security. *Troy City Bank v. Grant*, above cited; *Waterliet Bank v. White*, 1 Denio, 608.

Judgment on the verdict.

COMMONWEALTH V. GRAY.

(129 Mass. 474.)

Criminal evidence — adultery — reputation of woman for chastity.

On the trial of an indictment for adultery, evidence is competent to show the reputation for chastity of the woman with whom the offense is charged to have been committed.

CONVICTION of adultery. The opinion states the point.

G. W. Searle & J. H. Cotton, for defendant.

G. Marston, attorney-general, for Commonwealth.

LORD, J. Evidence which tends directly to prove or disprove the issue which the pleadings in any case present is always competent. It may have more or less weight, but it is the right of the party offering it to have it considered by the jury. It rarely however happens in the trial of a cause, that such evidence only is offered. This is especially true in every case in which the party having the burden of proof attempts to sustain it wholly by circumstantial evidence. In such case, every circumstance which is admitted in evidence becomes material, and may be controverted. Nor is the materiality of facts, not bearing directly upon the issue, confined to circumstances introduced upon issues to be sustained wholly by circumstantial evidence. It rarely happens, and in a contested case perhaps never happens, that some fact, in its character unimportant, and having no bearing upon the issue on trial, does not become material, so that evidence in relation to it cannot be rejected. The more common illustrations of this are perhaps time, place, or both time and place. In addition to these, collateral questions often arise which make facts material which otherwise are wholly unimportant. In criminal cases especially, the question of motive or provocation may become material, and be the subject of testimony. While in a criminal case the identity of the party charged with the one on trial is always material, yet other questions of identity may constantly arise, upon which testimony becomes material and competent, which otherwise would be wholly unimportant. Questions of character or reputation may often become material, and such questions may relate to a building, or a locality, as well as to an individual. It is sometimes said, but not with entire accuracy, that it rests with the presiding judge in his discretion to admit or reject evidence, as he shall judge it to be or not to be too remote. It often happens that the competency of evidence may depend upon the existence of some other fact; whether such fact exists is a preliminary question, to be decided by the presiding judge. His decision as to such fact cannot be revised; but his ruling as matter of law that such fact renders the evidence competent or incompetent is the subject of revision; and upon examination, in all those cases in which the admission of the evidence is said to rest in the discretion of the presiding judge, we think it will be found that it is the decision of a preliminary fact upon which the finding of the judge is conclusive, and which fact determines the competency of the evidence. See *Foster v. Mackay*. 7

Metc. 531 ; *Commonwealth v. Mullins*, 2 Allen, 295 ; *Kendall v. May*, 10 id. 59 ; *Commonwealth v. Morrell*, 99 Mass. 542 ; *O'Connor v. Hallinan*, 103 id. 547.

In this case, the precise question presented by the exception under consideration is, whether evidence of the character or reputation for chastity of a person with whom the adultery of the defendant is alleged to have been committed is admissible. It is quite true that legally her character or reputation is not in issue. No judgment upon this indictment can affect either her or her reputation ; and in no proceeding against her would a judgment upon this indictment be admissible in evidence. Still her character or reputation may be a material fact, and so evidence upon it be competent and material. There can be no doubt, that upon an indictment for adultery, the defendant may be convicted upon evidence wholly circumstantial ; and from the nature of the offense, it commonly happens that the act is finally inferred from circumstances, which circumstances may have in themselves very direct or only indirect bearing upon the issue.

Suppose, in a case depending upon circumstantial testimony, the government should offer evidence that the defendant, a married man, was seen at a late hour of the night to accompany a common prostitute to a house of ill fame, and was seen to leave that house early the next morning, it is quite apparent that not only the time, both at night and at morning, but the reputation, both of the woman and the house, would be important and material, and evidence would be admissible upon each one of them ; but neither of them is a fact which the judgment upon the indictment could in any mode affect, or in relation to which the judgment would be evidence. And so in relation to the character of the person with whom the adultery is alleged to have been committed ; the judgment could indeed have no effect upon her, but her character is so connected with and so contributing to her identity that it becomes as really one of the necessary surrounding circumstances as any fact in the case. At any time, upon a charge of adultery, the government, after showing the defendant's presence under suspicious circumstances with a woman, may show that that woman is a prostitute ; and it would seem to be reversing the humane maxim of the law to permit the government to prove as an independent fact the bad character of a woman in support of an issue, and to deny to the defendant the right to introduce evi-

Commonwealth v. Gray.

dence upon the subject upon the same issue. It has long been held, that upon a charge against a defendant of rape, the want of chastity of the person alleged to be ravished is competent; *Commonwealth v. Kendall*, 113 Mass. 210; and yet a judgment upon such indictment has no bearing upon the character of the person assaulted, and an acquittal of the defendant upon the single and precise ground that the party alleged to be ravished consented to the act, and a judgment founded upon it, could never be given in evidence against her.

We are not dealing, and we have no right to deal, with the weight of the evidence, unless we can see that no possible harm could come to the defendant by its rejection. The evidence is not reported for our consideration of this question. It is, indeed, true that the excepting party must show that he has suffered or been prejudiced by the ruling of the presiding judge. He shows this *prima facie*, when he shows that the presiding judge has refused to admit evidence which is competent upon the issue on trial. It then becomes the duty of the other party to show that the rejection of the evidence could not possibly have injured him; and perhaps, if we assumed that all the evidence was reported for the purpose of enabling us to determine such question, we might be satisfied that the evidence ought not to have had any weight, if admitted, and so its rejection could have done the defendant no harm. It is easy to imagine such a case. A man is charged with adultery. It is proved that he has a wife alive in a foreign country, and in entire ignorance of this fact, the party with whom the adultery is charged innocently and in good faith marries and cohabits with him. In such case, the more spotless the character of the woman, the greater, morally, is his guilt; and it would be easy to see that the rejection of evidence of her good character could not prejudice the defendant upon that state of the facts. But in the case at bar we have not all the facts of the case, nor were the facts as before us reported with a view of testing the weight, but only the competency of the evidence.

Exceptions sustained.

COMMONWEALTH V. BOSTON & MAINE RAILROAD.

(129 Mass. 500.)

Carrier — "passenger" — leaving cars in motion.

A railway train having overshot a station, a passenger for that station got off while the train was in motion, and was killed by another train while making his way to the station. *Held*, that he had ceased to be a passenger, and the railway company was not criminally liable under the statute. (*See note, p. 381*)

CONVICTION of causing death of passenger. The opinion states the facts.

D. S. Richardson and G. F. Richardson, for defendant.

T. H. Sweetser and G. A. James, for Commonwealth.

Soule, J. It is contended on the part of the government, that where the person killed was a passenger, the statute does not require, in order to the maintenance of an indictment, that he should have been using due care. But whether this is so or not need not be decided, because, in the opinion of a majority of the court, when Hill was killed he was not a passenger within the meaning of the statute.

It is undoubtedly true that one who has bought a ticket, or otherwise become entitled to transportation on a particular train of cars of a railroad corporation, is ordinarily a passenger of the corporation from the time when he reasonably and properly starts from the ticket office or waiting room in the station to take his seat in a car of the train, till he has reached the station to which he is entitled to be carried, and has had an opportunity, by safe and convenient means, to leave the train and roadway of the corporation at that station. *Warren v. Fitchburg Railroad*, 8 Allen, 227. The duty of the corporation toward him is to furnish a well-constructed and safe road, suitable engine and cars, competent and careful enginemen, conductors and other necessary laborers, in order that all injuries which human foresight can guard against may be prevented. But this duty rests on the corporation only so long as the passenger sees fit to be carried by it; and if he chooses

Commonwealth v. Boston and Maine Railroad.

to abandon his journey at any point before reaching the place to which he is entitled to be carried, the corporation ceases to be under any obligation to provide him with the means of travelling further. And while it is true, that if he leaves the train while it is at rest at a station, he is entitled to an opportunity so to do in safety, it is equally true that the corporation is not under any obligation to make it safe for him to leave the train while it is in motion, and that if he does so, he assumes all risk of injury. *Gavett v. Manchester & Lawrence Railroad*, 16 Gray, 501. It would not be contended by any one that an indictment under the statute could be maintained against a railroad corporation for causing the death of one who without looking to see if the track was clear, jumped from a train which was running at ordinary speed between stations, and was immediately afterward killed by the engine of a train going in the opposite direction on another track. The indictment would fail because the facts showed that the corporation owed no duty to the deceased. He would have ceased to be a passenger, by voluntarily leaving the train at a place and time when and where the corporation could not anticipate that he would leave it, and when and where the corporation was under no obligation to see that he had an opportunity to leave its roadway in safety after leaving the train. He would have become an intruder on the track of the corporation, acting without any regard to the dangerous character of the situation, and not entitled to protection against the consequences of his own negligence. The principle involved in the supposed case is involved in and governs the case at bar.

So long as the train was in motion, Hill could not leave it and still retain his right to protection till he had left the roadway of the corporation. By leaving the train while in motion, he ceased to be a passenger, and to have the rights of a passenger, as completely, though the train was moving slowly, and was near by the station, as if he had left it while moving at full speed between stations. *Hickey v. Boston & Lowell Railroad*, 14 Allen, 429. The fact that the car in which Hill was had passed the platform of the station to which he was entitled to be carried did not give him the right to leave the train at the risk of the company. If he sustained any injury by being carried beyond the station, his remedy would be by an action, counting on that injury.

Hill, having ceased to be a passenger, was on the track of the

Commonwealth v. Boston and Maine Railroad.

defendant's road under circumstances which preclude the idea that he was in the exercise of due care. The evidence on this point is all in one direction, and is to the effect, that if he had looked, he could not have failed to see that the approaching train on the other track was so near that he could not cross the track before it would strike him.

It follows that the defendant was right in asking the ruling that there was no sufficient evidence to support either count of the indictment. There was no evidence to support the counts in which Hill is alleged to have been a passenger, because by his voluntary act he had ceased to be a passenger, or to be entitled to protection as a passenger. There was no evidence to support the counts in which he is alleged not to have been a passenger, because there was no evidence that he was in the exercise of due care.

Exceptions sustained.

NOTE BY THE REPORTER. — Two recent cases on this subject deserve notice. In *Cotter v. Frankford & Southwark Ry. Co.*, Pennsylvania Common Pleas, January 22, 1881, the facts were as follows: The plaintiff resided at Frankford, 23d ward, Philadelphia, and was in the habit of riding on the defendants' road each morning by a six o'clock train to Bromley's mills, at Germantown avenue and York street, at which place he was employed. The defendants used in that section of the city a dummy engine and two of the ordinary passenger street cars as a train. The defendants' train had stopped at Unity street, Frankford, to take on passengers, and had started again, when the plaintiff signalled the engineer to stop, and as he did not stop he ran toward the train, and in attempting to get on the platform of the middle car his foot slipped and he fell under the wheel, and his leg was so crushed and injured that it had to be amputated. As an excuse for attempting to get on the car the plaintiff testified that on a former occasion one of his fellow-workmen at Bromley's mills, who was allowed by the company defendant to act as brakeman on the six o'clock train in the morning, in consideration of a free ride, said to him as he got on the car that he was young and should run and jump on the car. This was denied by the witness on the other side, and witnesses were also produced who testified that they had warned the boy against jumping on the car while in motion. The jury found in favor of the plaintiff. The court said: "The degree of care required of a child of tender years is always a question of fact for the jury, and what is negligence *per se* in an adult, might not be so in one of tender years. But an important question in this case is, what duty was owing by the defendant to the plaintiff? The train was bound to stop on his signal, and on failure to do so, the defendant would be liable in damages resulting therefrom, if loss of employment or otherwise; but it would be irrational to say that a failure on the part of those in charge of the train to stop would justify any one old enough to travel alone in attempting to get on a moving train as a passenger. The duty to the plaintiff did not therefore extend to his personal safety when not on the train as a passenger, nor to his safety getting on, unless the train had stopped." The court also held that the invitation on the former occasion did not bind the company, because outside the scope of the servant's authority, and not contemporaneous. To same effect, *Phillips v. Rens., etc., R. Co.*, 49 N. Y. 177; *Huebner v. N. O. & C. R. Co.*, 28 La. Ann. 492.

The next case, *Kelly v. Hannibal & St. Joseph Railroad Co.*, 70 Mo. 604, was the converse of the above in its circumstances. The plaintiff in the latter case was a passenger who was injured in trying to leave a train under slow motion, having been negligently carried past his destination. The court below nonsuited the plaintiff, and this was reversed, the court holding that the question of negligence was one for the jury. The court said,

Commonwealth v. Boston and Maine Railroad.

"In the case of *Doss v. M., K. & T. R. R. Co.*, 59 Mo. 27; s. c., 21 Am. Rep. 371, it was held that whether the attempt of plaintiff to step from the cars while the train was in motion was, under all the circumstances of the case, such negligence as would relieve defendant of all liability for accident, was a question of fact for the jury. For a person to jump from a car propelled by steam while in rapid motion is mere recklessness, and the leap must be made at his peril; but to step from a car not beyond the platform, when its motion is slight or almost imperceptible, may or may not be negligence, and of this the jury are to decide from all the attending circumstances. The following cases are to the same effect: *Wyatt v. Citizens' R. R. Co.*, 55 Mo. 435; *Karle v. K. C., St. J. & C. B. R. R. Co.*, 55 id. 476; *Loyd v. H. & St. J. R. R. Co.*, 53 id. 509; *Benham v. St. L. & I. M. R. Co.*, 56 id. 338. "These are risks which the most prudent men take, and the plaintiff will not be barred of a recovery if he adopted that course which the most prudent men would take under the circumstances." *Smith v. U. R. R. Co.*, 61 Mo. 538; *Meyer v. Pacific R. R. Co.*, 40 id. 151." "If a passenger be negligently carried beyond his stopping place, and where he had a right to be let off, he can recover for the inconvenience, loss of time, and expense of travelling back. But when he jumps, or leaves the train, under circumstances which prudence would forbid, he does it at his own risk and assumes the consequences of his own act." To the same effect, *Damont v. New Orleans & Carrollton Ry. Co.*, 9 La. Ann. 441. In the *Doss* case the plaintiff was not a passenger, but had gone into the car to attend some friends, and the train was started without reasonable notice. The leading case to the same effect is, *Railroad Co. v. Aspell*, 23 Penn. St. 147; *Thomp. on Carr. Pass.* 252. To the same effect, *Jeffersonville, etc., R. Co. v. Jefferson's Adm'r*, 26 Ind. 228; *Morrison v. Erie Ry. Co.*, 56 N. Y. 302; *Burrows v. Same*, 63 id. 556; *Dougherty v. Chicago, etc., R. Co.*, 86 Ill. 467; *Lucas v. New Bedford, etc., R. Co.*, 6 Gray, 64.

The case is different if the passenger acts under the instructions of the company's employees. Thus, in *Chicago & Alton Railroad Co. v. Randolph*, 53 Ill. 518; s. c., 5 Am. Rep. 60, the plaintiff purchased a ticket and got on a freight train. The train not stopping at his station (and not being advertised to stop there), he jumped on while it was moving slowly, and was injured. There was conflicting evidence whether the conductor suggested to him to jump. It was held that it was a question for the jury whether the plaintiff acted prudently.

In *Lambeth v. North Carolina R. Co.*, 66 N. C. 794; s. c., 8 Am. Rep. 508, the decedent was killed in attempting to leave a train moving from two to four miles an hour. The conductor went out on the platform to help him alight. It was held that if without direction from the conductor he voluntarily incurred danger by jumping off, there could be no recovery; but otherwise if the motion was so slow that the danger was not apparent to a reasonably prudent person, and the decedent acted under the conductor's instructions. The circumstances and holding were substantially like this case in *Filer v. N. Y. C. R. Co.*, 49 N. Y. 47; s. c., 10 Am. Rep. 327, where the train was advertised to stop; and *Georgia R. Co. v. McCurdy*, 45 Ga. 388; s. c., 13 Am. Rep. 577. In the latter case the conductor agreed to let the passenger off at a stopping place for wood and water only. The court indulged in the following graphic language: "Who that has seen much railroad travel can fail to see in his mind the picture of this scene? The conductor in a pet; his train bound to slack up its speed at an unusual point; the passenger conscious that he was giving unusual trouble; the train slacks its speed; he stands ready, the conductor ready also, to give the word—now jump! None but a timid and yet resolute man would fail, and jump he did."

But in *Southwestern R. Co. v. Singleton*, Ga., it was held that if one leaps from a train of cars moving at the rate of fifteen miles per hour, on the advice or concurrence of the conductor, his right to recover would involve the question whether he prudently used the only way which the rules of the company permitted him to use, and also his recklessness and want of ordinary care, for if by the use of ordinary care he could have avoided the injury, the company would not be liable.

In *Loyd v. Hannibal & St. Joseph R. Co.*, 53 Mo. 509, the train stopped at the station only a minute; during that time plaintiff's little child alighted; plaintiff followed without delay, but after the train was in motion, and received her injuries in consequence of jumping from the train. Held, that plaintiff would not be barred of recovery by the fact that she jumped from the train while in motion. See also, *Penn. R. Co. v. Kilgore*, 32 Penn. St. 292, where the circumstances were precisely similar.

Commonwealth v. Boston and Maine Railroad.

In *Texas & Pacific Ry. Co. v. Murphy*, 48 Tex. 386; s. c., 25 Am. Rep. 272, the court charged that starting the train on the instant of the signal was negligent, and that while attempting to board a train moving rapidly would be negligent such an attempt, if the train were moving slowly, would not be negligent. *Held*, error, and that this was a question of fact. See also, *Johnson v. Westchester R. Co.*, 70 Penn. St. 357.

In *Eppendorf v. Brooklyn City, etc., R. Co.*, 69 N. Y. 195; s. c., 25 Am. Rep. 171, the plaintiff signalled a street car to stop; the car was open, with a side step or rail; the driver applied the brake, and while the car was moving slowly, the plaintiff undertook to board it, when the driver started suddenly, and he was injured. *Held*, a proper case for the jury. The court said: "Ordinarily it is perfectly safe to get upon a street car moving slowly, and thousands of people do it every day with perfect safety." And so it is not negligence *per se* to leap from a street car in motion, when it has not stopped on request. *Wyatt v. Citizens' R. Co.*, 55 Mo. 485; *Crisscy v. Hestonville, etc., R. Co.*, 75 Penn. St. 83. But *contra* (*obiter*), *Nichols v. Sixth Ave. R. Co.*, 38 N. Y. 181.

In *Chicago City Ry. Co. v. Mumford*, 97 Ill. 560, the court said: "It is a fact, in regard to which there is no dispute, that the plaintiff desired to get off the car at the Palmer House, and the driver had been notified of this fact and had agreed to stop the car and let the plaintiff off at this place. The instruction, with these facts before the jury, in substance directed them, that if the plaintiff, when near the Palmer House, undertook to get off the car while it was going slowly, the driver having no notice of his intention, he could not recover, although the car started forward just as he was stepping off. Had the instruction said that plaintiff, before he reached the Palmer House, or before he was opposite the entrance, without notice to the driver, and while the car was moving at its usual rate of speed, undertook to get off, etc., it might have been sustained, but its language and meaning are entirely different. When the plaintiff was opposite the entrance to the Palmer House, he was *near* the Palmer House, and if, when opposite the entrance, he undertook to get off, the car being barely in motion, or as stated in the instruction, which may mean the same thing — going slowly — and as he was in the act of stepping off, the car started forward, and he was thrown to the ground and injured, he might recover — but had the instruction been given he could not. We are of opinion that the instruction was calculated to mislead the jury, and the court did not err in refusing it."

It is not necessarily negligent in a passenger to jump off a railway train in fast motion to avoid a collision, even if he would have escaped injury by remaining in his seat. Thus in *Wilson v. Northern Pacific R. Co.*, 26 Minn. 278, the court said: "The fourth request of defendant asked the court to lay down the rule that there was no excuse for plaintiff jumping from the car, unless the motion of the car clearly indicated to persons of ordinary prudence and understanding that the car was then off the track. This requested instruction was wrong. One reason of several why it was incorrect was that it asked the court, instead of the jury, to determine what circumstances would lead a person of ordinary prudence to do as it was claimed plaintiff did."

"Defendant's eighth and eleventh requests made, in effect, the proposition that if plaintiff could, with reasonable endeavors, have remained in his seat, and if, had he so remained, he would not have been injured, then he cannot recover. This would make the propriety of a passenger jumping from the car depend on the result alone; not upon his exercising ordinary prudence in choosing which of two perils to abide, but upon his foreseeing the event of either peril. The requests were incorrect."

"The meaning of defendant's third request is somewhat ambiguous, and the court might have refused to give the instruction for that reason. As we understand it, however, and as the jury might have understood it, had it been given, it would put upon a passenger the duty of determining correctly the actual existence and extent of the danger. The modification which the court made does not leave the instruction as clear as might be wished, but made it, in effect, an instruction that to excuse jumping from a car going at great speed, there must be such circumstances or conditions of peril as would induce such fear and tremor, in persons of ordinary prudence and firmness, as to lead them to such action. This does not differ from the rule laid down in the general charge."

"It is well settled, with reference to the liability of common carriers of passengers, that if through the negligence of the carrier, a passenger is placed in a situation of great peril, the attempt of the passenger to escape the danger, even by doing an act also dangerous,

Pierce v. City of New Bedford. Harrigan v. Connecticut River Lumber Co.

and from which injury results, is not necessarily an act of contributory negligence, such as will prevent him recovering for the injury sustained. If it were, passengers would be required to suppress the instinct of self-preservation, and sit passive, to receive whatever might befall them, instead of acting as nature impels every man to act.

"The test of contributory negligence, where the passenger is injured in endeavoring to escape the peril in which the negligence of the carrier has placed him, is, was the attempt an unreasonable, precipitate or rash act, or was it an act which a person of ordinary prudence might do? This is not determined by the result of the attempt to escape, nor by the result that would have followed had the attempt not been made. To permit that to determine it would be, in effect, to require of the passenger to judge with absolute certainty the extent to which the danger would go if he made no move, and with like certainty the consequences of the attempt to escape.

"In the case at bar, no degree of prudence, and it is doubtful if any degree of skill and experience in operating railroads, would enable one to determine with certainty that he would not be injured if he remained in the car, nor that he would be injured if he left it. The passenger in such a case must of necessity judge of the danger in remaining where he is, as also of the danger in attempting to escape, by the circumstances as they then appear to him, and not by the result. He acts upon the probabilities as they then appear to him, and if he acts as a man of ordinary prudence would in such case act, he will choose the hazard that from these circumstances appears to him to be the least. If plaintiff did so act (supposing him to have jumped from the car, as claimed by defendant), then the attempt to escape was not contributory negligence. *Stokes v. Saltonstall*, 13 Pet. 181; *Bud v. New York Central R. Co.*, 31 N. Y. 814; *Twomley v. Central Park, etc., R. Co.*, 69 id. 158; s. c., 25 Am. Rep. 162. That he was injured in his attempt to escape, and that those who remained in the car were unhurt, might of course be considered by the jury in determining this question." See note, 25 Am. Rep. 164.

PIERCE V. CITY OF NEW BEDFORD.

(129 Mass. 534.)

Negligence — defect in highway — coasting on street.

Coasting upon hand-sleds on a city street is not a defect or want of repair of a highway, for which the city is liable to one injured thereby.

SUFFICIENTLY reported in note, 35 Am. Rep. 782.

HARRIGAN V. CONNECTICUT RIVER LUMBER COMPANY.

(129 Mass. 580.)

Constitutional law — State regulation of rafts.

A statute of Massachusetts, prohibiting the driving or floating of logs, timber, etc., down the Connecticut river, unless the same are formed into rafts and sufficiently manned, is constitutional as to logs, etc., coming from another State through Massachusetts on the way to a third State.

Harrigan v. Connecticut River Lumber Co.

ACTION for injury to boat by floatings logs. The opinion states the point. The plaintiff had judgment below.

G. M. Stearns (H. K. Hawes with him), for defendant.

M. P. Knowlton & C. L. Long, for plaintiff.

LORD, J. At the trial, no question was made of the propriety of any ruling except one upon the provisions of the Gen. Stats., ch. 78, § 5. The presiding judge ruled that any acts done in violation of that statute were *prima facie* wrongful; and the only objection made by the defendant to the ruling is that the statute is unconstitutional, for the reason that it is not competent for the legislature of the Commonwealth to pass any law upon that subject, it being within the exclusive jurisdiction of Congress in the exercise of its power "to regulate commerce among the several States."

The chapter, of which the section in controversy * forms a part, contains six sections, and the title is "Of timber afloat or cast on shore." The other five sections of the chapter guard very strictly the rights of property in logs, masts, spars and other timber which is properly floating in the river; and interference with such property is prohibited under highly penal provisions. The statute does not profess to take from the character of the Connecticut river that of a great highway, and it is not necessary to consider whether strictly that river is or is not technically "navigable waters." The tide does not ebb and flow therein within the limits of this Commonwealth, and dams and bridges by authority of the legislature of Massachusetts have been erected over and across it in various places.

It is not, in our view, necessary to discuss the relative rights of Congress and the legislatures of the several States to pass laws affecting interstate commerce. No question upon that subject can be raised upon the facts in this case, nor can any such question be raised under this provision of law.

* "No person shall cause or permit to be driven or floated down Connecticut river, any masts, spars, logs or other timber, unless the same are formed or bound into rafts and placed under the care of a sufficient number of persons to govern and manage the same as to prevent damage thereby. If damage is done to a bridge or dam upon or over said river, by any timber so driven or floated in any manner not herein allowed, the owner of the timber, and every person who causes or permits the same to be so driven or floated shall be jointly and severally liable for all such damage, to be recovered by the party injured in an action of tort."

Harrigan v. Connecticut River Lumber Co.

When there is such a state of facts, or there are such provisions of law as to raise the question of such relative rights, a discussion of the subject is always interesting, nor is it wholly free from difficulty, and if we confine ourselves to the words used by different judges, there is undoubtedly an apparent conflict in adjudicated cases. It is not important to consider in this case how far such conflict is real, or only apparent. There is no doubt, that upon such a stream as this, matters may arise which are subject to State legislation, or that the stream may be the means of such interstate communication as to authorize the legislation of Congress to regulate the commerce thereon. In the comparatively recent case of *Railroad Co. v. Husen*, 95 U. S. 465, Mr. Justice STRONG, in delivering the opinion of the court, uses this language: "While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State; while for the purpose of self-protection it may establish quarantine and reasonable inspection laws; it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection." This language is broad enough to cover a much wider field of legislation than this statute attempts. As before said, this legislation does not attempt to deprive the Connecticut river of the character of a highway. It does not interfere with any use of it as such, and all interstate commerce may be conducted over its waters with the same freedom as over its roads, bridges and other highways. If the legislature had ordered that the Connecticut river should not be used for the transportation of logs, masts and spars from the State of Vermont to the State of Connecticut, a very different question would have been presented. That question does not arise, and need not be discussed. That it is competent for the legislature of a State to prescribe the mode in which its ways shall be used to avoid collision and conflict, and to prevent injury to persons or property rightfully thereon and to prevent obstructions therein, cannot be questioned; and such legislation has no relation to, and does not interfere with, commerce between the States. The section of the law declares in its terms the object and purpose of its provisions. It requires logs, masts and spars to be so arranged that they may be controlled by those having them in charge, and its purpose is to prevent damage to

Harrigan v. Connecticut River Lumber Co.

dams and bridges, lawfully erected upon and across the river. Neither a log nor any number of logs floating upon the surface of a stream, uncontrolled and uncontrollable, is navigation or commerce.

The case perhaps most strongly relied upon by the defendant, that of *Railroad Co. v. Husen*, *ubi supra*, bears no analogy in its facts to the case at bar. The legislature of Missouri had undertaken to enact that cattle from Texas should not be transported through the State of Missouri except in the particular mode pointed out in its statute. The law did not apply to any great river as a highway, nor to any of the ordinary public roads of the State; but to the mode of transportation within railway cars. If the State of Missouri had enacted a law that no cattle from Texas should be driven through that State upon its highways into another State for sale, it may be conceded that the decision of the Supreme Court of the United States in *Railroad Co. v. Husen* would have been applicable, and that such legislation was not within the authority of the State. To present any analogy between the passage of cattle through a State and the facts of the case at bar, the provision of law should be that no cattle from anywhere should be allowed to be at large in the street without a keeper; and when it has been decided by any competent authority that it is not within the power of a State legislature by law to forbid cattle being at large in a highway without a keeper, there will be some foundation for the claim that a State has no power to prevent logs, masts and spars, uncontrolled and uncontrollable, from floating down the stream, carrying with them bridges and dams, and destroying every variety of boat and vessel employed in useful and lawful commerce.

The defendant however relies with much confidence upon the decision by the Supreme Court of Maine in the case of *Trent v. Lord*, 42 Me. 552. It is contended that by the decision in that case the right of every person to float logs upon navigable waters is absolute, and the power to regulate it is alone in Congress. No such principle is embraced within that decision. Upon the other hand, the right of the State to legislate upon the subject is upheld as absolute, even to the extent of deciding that the use of such stream may be absolutely forbidden by the legislature. The plaintiff in that case contended that by a grant of five thousand acres of land made by the legislature of the Commonwealth of Massachusetts, on February 7, 1820, he became possessed of the exclusive

Harrigan v. Connecticut River Lumber Co.

right to the use of the stream, upon which his dam was erected, within the limits of his grant, and that such ownership authorized him to construct a dam across the stream because the grant was upon the condition, among other things, that he should give a bond with sureties that he would within two years erect and put in operation a good and sufficient saw-mill and grist-mill on the stream in question, and that he had thus erected such mill, and that said mill at the time of the alleged trespass was standing and in operation. The important question decided by the court was not whether the legislature had authority to act upon the subject of the use of that stream, but whether as matter of fact it had acted. It was stated in that case that there was a distinction between the rights of property in a State and the rights of sovereignty; that the former could be lost by non-use or by disseizin; that the latter could not thus be lost; and in construing the grant to Treat, the court held that the grant was a grant only of property, and was not in any sense a grant of its rights of sovereignty; that the right of every individual to use the waters of such stream could not be taken away by any grant of the right of property in it by the State, because a grant of the right of property is construed as having been made subject to that public easement which can be destroyed only by an exercise of sovereignty by the legislature. The opinion in that case is carefully analyzed, and the various head notes very clearly state the exact points decided, the first of which is in these words: "The State, by virtue of its sovereignty or right of eminent domain, may abridge, control or destroy a public easement in a stream within its limits; but until it does so by positive legislation, all persons may lawfully enjoy such easement in common with the State." If this proposition is sound, it is clear that the authority of the legislature is much more extensive than that which has been exercised by the legislature of Massachusetts. The next essential point decided in that case is that "a conveyance by the State of all its right, title and interest in and to the lands over which a navigable stream flows, does not authorize the grantee, or those claiming under him, to use exclusively or to destroy the public easement in said stream."

Neither of these propositions, nor any other decided in that case, has the slightest bearing upon any question involved in the present case. There is no intimation that the legislature has not authority to regulate the mode in which the easement should be used; but

Harrigan v. Connecticut River Lumber Co.

on the other hand, the power is expressly asserted in the legislature, not only to regulate, but to prohibit the exercise of the right; nor is there any thing in the report of the case, which, by implication even, can be understood as recognizing the fact that a single log or many logs floating uncontrolled, with no power of the owner over them, is either commerce or navigation. All the language of the report implies that the logs were at all times under the control and direction of those driving them. It would be impossible upon any other theory to satisfy the rules of law which were given to the jury in regard to the care and diligence of the defendant, and the respect which he was bound to have for the plaintiff's rights, and that his own must be so exercised as to do the least injury to the plaintiff's property. It would be a mere absurdity to say that the right to use the river for logs tumbled into the stream, and floating down uncontrolled, and carrying with them the plaintiff's dam, is consistent with the law declared in that case.

The case of *Carter v. Thurston*, 58 N. H. 104, is no more favorable to the claim of the defendant. In that case it was decided only that any person had the right to make a reasonable use of a public stream; that in such use he was not responsible for any damage done without his fault, that is, that the use itself is not a wrong-doing; but that he is responsible for injury done by his carelessness.

There is no ground for the inference that in the use of the river as a highway the legislature may not make suitable regulations for its more convenient and safe use by persons having equal rights thereon, or that a use in violation of such regulation is authorized under the Constitution of the United States, and cannot be limited by State legislation because such regulation is an interference with interstate commerce.

Exceptions overruled.

French v. City of Boston.

FRENCH V. CITY OF BOSTON.

(129 Mass. 592.)

Municipal corporation — negligence in performance of statutory duty.

A city, bound by statute to maintain a draw-bridge as part of a public highway, is not liable to the owner of a vessel for detention caused by the draw being narrower than the law prescribes, nor for the action of the superintendent of the bridge, resulting in delaying the vessel, in the absence of an express statutory liability.*

ACTION of damages for detention of vessel by the defendant's superintendent of a public draw-bridge. The draw was narrower than was prescribed by law, and the superintendent refused to open it because it was too narrow for the passage of the vessel. The opinion states other facts.

G. Marston, for plaintiff.

H. B. Sargent, Jr., for defendant.

MORTON, J. The Statute of 1874, ch. 259. imposes upon the city of Boston the duty of maintaining Warren Bridge as a public highway "at its own expense, and in accordance with such ordinances as the city council of said city may establish." The duty thus imposed upon the city is a public duty, from the performance of which it receives no profit or advantage. It is well settled in this Commonwealth, that no private action can be maintained against a city for the neglect to perform such a duty, unless it is expressly authorized by statute. *Hill v. Boston*, 122 Mass. 344 ; s. c., 23 Am. Rep. 332, and cases cited. By statute the city is liable to a traveller thereon for any defect in the highway of which the bridge is a part, but there is no statute which makes it liable to a private action for a failure to provide a draw of proper width, or for the carelessness of the superintendent of the bridge in delaying vessels which seek to pass through the draw. It follows that the plaintiff cannot maintain this action.

Judgment for defendant.

* Compare *Moulton v. Scarborough* (71 Me. 267), 36 Am. Rep. 308.

Cole v. City of Newburyport.

COLE V. CITY OF NEWBURYPORT.

(129 Mass. 504.)

Municipal corporation — negligence — licensing exhibition of animal

A city, having for a fee licensed the owner of an animal to erect a booth on a public square and there to exhibit the animal, is not liable for an injury caused by the animal's frightening a horse while such animal was being exercised on the public street outside the booth.

SUFFICIENTLY reported in note, 35 Am. Rep. 795.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

STATE v. TORINUS.

(26 Minn. 1.)

Officer — public — ultra vires — ratification by State.

Where an agent of the State, without authority, sells property of the State and takes a note in payment, the legislature may ratify his act and enforce the note. (See note, p. 397.)

ACTION on a promissory note. The opinion states the point. The plaintiff had judgment below.

McCluer & Marsh, and Bigelow, Flandrau & Clark, for appellants.

Davis, O'Brien & Wilson, for respondent.

CORNELL, J. In a former action between these parties, the question was presented to this court, on appeal therein, as to the validity of the note in controversy in this action. Upon the facts therein stated, it was held invalid for want of consideration, for the reason that it was given solely upon an unauthorized sale of logs from plaintiff to defendants, made by an agent of the former, by which

no title or interest whatever in the property was transferred. 24 Minn. 332. Since then, and before the commencement of this action, the State, by legislative enactment, has duly and fully ratified and adopted the act of its agent Harriman in making the sale and taking the note, and the question now before us relates to the legal effect of this ratification. It is objected that it is ineffective for any purpose, because a contract void as prohibited by statute cannot be made good by a subsequent statute. While this is true as to acts and contracts made absolutely void and prohibited by law because of their illegal character, and as being *contra bonos mores*, the rule has no application to the facts of this case. Giving credit on the sale of logs, or taking notes in payment, is not prohibited by any law or statute. The act of Harriman as the agent of the State in giving credit to the defendants on the sale of his principal's property to them, though unauthorized and impliedly prohibited by the statute which gave him his authority, was not in itself an act of a wrongful or immoral nature, or tainted with any vice of illegality of that character, nor was it prohibited as such by any statute. The statute under which he acted was not directed to that end. It was rather in the nature of a power of attorney, which conferred upon the agents of the State a specific and limited authority in reference to certain matters, and which defined particularly the extent of such authority. In making the sale of his principal's property on time, and taking a note for the purchase-money, the agent, Harriman, exceeded his delegated authority, and for that reason alone, his act was an invalid one. It was competent however for the State as principal to make it good by legislative enactment, adopting it as its own; for it could have authorized it in the first instance, and whatever it can do or direct to be done originally, it can subsequently, and when done, lawfully ratify and adopt, with the same effect as though it had been properly done under a previous authority. That the State might, through its legislature, in the absence of any prohibition in its fundamental law, have authorized Harriman as its agent in the first place to make the very sale he did, admits of no doubt. The proprietary rights of a State are as absolute and unqualified as those of an individual. It may, in the absence of any self-imposed restrictions in its Constitution, sell and dispose of its property upon its own terms and conditions, for cash or upon credit; and it may also take, hold and enforce notes and obligations received from the purchasers of its property, the same as individuals

State v. Torinus.

can. But as the legislative department is the only one that represents the State in respect to such rights, it alone can exercise the power necessary to the enjoyment and protection of those rights, by the enactment of statutes for that purpose. In the case before us, the State has duly ratified the acts of its agent in making the sale to the defendants, so that the title to the property which they purchased, the possession of which they still hold, has become perfect, and they cannot longer object that the note they gave is without consideration.

In respect to the other point suggested by the defendants, in respect to the character of the plaintiff's title to the property which it sold to the defendants, it is fully answered by the case of *Schulenberg v. Harriman*, 21 Wall. 44, where it was held that the legal title of the State to the lands from which the logs in question were taken was an absolute one, and that a stranger to the grant under which the State holds its title cannot raise any question upon the non-performance of any of the subsequent conditions contained in such grant. The same doctrine is also explicitly held in *Baker v. Gee*, 1 Wall. 333.

Order affirmed.

NOTE BY THE REPORTER.—Judge COOLEY says (Const. Lim. *371): "A retrospective statute curing defects in legal proceedings where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds unless expressly forbidden. Of this class are the statutes to cure irregularities in the assessment of property for taxation and the levy of taxes thereon; irregularities in the organization or elections of corporations; irregularities in the votes or other action by municipal corporations, or the like, where a statutory power has failed of due and regular execution through the carelessness of officers or other cause; irregular proceedings in courts, etc." "On the same principle legislative acts validating invalid contracts have been sustained. When these acts go no further than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, the question which they suggest is one of policy, and not of constitutional power." P. *374. "The right which the healing act takes away in such a case is *the right in the party to avoid his contract*,—a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect." P. *378. "But the healing statute must in all cases be confined to acts which the legislature might previously have authorized. It cannot make good retrospectively acts or contracts which it had no power to permit or sanction in advance." P. *382. As when a grantor undertakes to convey more than he possesses, or in contravention of his title, or in fraud of the rights of his principal. P. *379. "The operation of these cases however must be carefully restricted to the parties to the original contract, and to such other persons as may have succeeded to their rights with no greater equities." P. *378. See also, Wade on Retro-active Laws, ch. 7.

The following cases illustrate these principles:

What may be ratified. Town bounty bonds issued without authority to induce enlistments. *Kunkle v. Town of Franklin*, 13 Minn. 127; *Winchester v. Corinna*, 55 Me. 9; 8 P. *Inhabitants of Pembroke v. Grover*, 11 Allen, 90; *Brook v. Town of Woodbury*,

State v. Torinus.

22 Conn. 129. County bonds irregularly executed. *Thomson v. Lee County*, 3 Wall. 27. Invalid municipal railway-aid bonds. *Bass v. Mayor*, 80 Ga. 845; *City of Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *McMillen v. Boyle*, 6 Iowa, 304. A tenancy void as between persons holding under a Connecticut title. *Satterlee v. Matthews*, 13 S. & R. 169; s. c., 2 Pet. 380. A bond for jail limits. *Walter v. Bacon*, 8 Mass. 488. A liability for supporting the widow and children of an inhabitant. *Inhabitants of Bridgewater v. Inhabitants of Plymouth*, 97 Mass. 382. A deed made as executor and trustee before appointment and qualification. *Weed v. Donovan*, 114 Id. 181. Insolvency proceedings had before a person acting as judge without title to the office. *Denny v. Mattoon*, 2 Allen, 361. Contracts partly void for usury. *Savings Bank v. Allen*, 28 Conn. 97. Security void for usury. *Andrews v. Russell*, 7 Blackf. 774; *Wilson v. Hardesty*, 1 Md. ch. 66. A note discounted by a bank having no power to discount. *Lewis v. Elvain*, 16 Ohio 347. A mortgage executed by a corporation without authority. *Trustees v. McCaughy*, 2 Ohio Stat. 152. A contract void for stock-jobbing, by the repeal of the statute. *Washburn v. Franklin*, 35 Barb. 599. A married woman's deed imperfectly executed. *Watson v. Mercer*, 8 Pet. 88; *Dentzel v. Waldie*, 30 Cal. 138. A check void for want of a stamp, by a subsequent statute allowing one to be affixed. *Gibson v. Hubbard*, 18 Mich. 214. A bond void for want of a stamp, by the repeal of the stamp act. *State v. Norwood*, 12 Md. 195. A levy made after the expiration of the statutory time. *Selsby v. Redton*, 19 Wis. 1; *Mather v. Chapman*, 6 Conn. 54. Taxes and assessments irregularly laid. *Yild v. Charleton*, 29 Wis. 400; *Blount v. City of Janesville*, 31 Id. 648. A marriage, so as to legitimate a bastard. *Goshen v. Stonington*, 4 Conn. 209; 10 Am. Dec. 121. The certificate of formation of a bank defectively executed. *Syracuse City Bank v. Davis*, 16 Barb. 188. A deed lacking the notary's seal to the acknowledgment, such omission rendering the deed inadequate to pass title. *Maxey v. Wise*, 25 Ind. 1. A deed so defectively executed by the grantor that it passed no title. *Dulaney v. Tilgham*, 6 G. & J. 461. A sheriff's deed embracing land out of his bailiwick, the consideration having been paid and applied to the owner's debts. *Menges v. Wertman*, 1 Penn. St. 222. A deed acknowledged by husband and wife outside the State by an unauthorized officer. *Stevens v. Martin*, 18 Penn. Stat. 101.

What may not be ratified. An expenditure by a city, for harbor improvements, in excess of the amount originally authorized by the legislature. *Hasbrouck v. City of Milwaukee*, 18 Wis. 37. County bonds void because not issued in conformity to the directions of the act authorizing their issue. *Comr's v. Carter*, 2 Kans. 115. A sheriff's sale held by the court to pass no title. *Mayes v. Deutler*, 33 Penn. St. 495. Judicial proceedings void for want of jurisdiction. *Richards v. Rote*, 68 Penn. St. 248. A conveyance by a married woman void for want of power to convey. *Shouk v. Brown*, 61 Penn. St. 320. A contract for sale of intoxicating liquors, void when made by a subsequent repeal of the prohibitory statute. *Hathaway v. Moran*, 44 Me. 67; *Baucher v. Mansel*, 47 Id. 58. A release of dower, voidable when executed, and avoided before the passage of the act. *Adams v. Palmer*, 51 Id. 480. A note payable in prohibited bank bills, by the repeal of the prohibitory statute. *Springfield Bank v. Merrick*, 14 Mass. 322; S. P., *Milne v. Huber*, 3 McLean, 212. A contract to sell lottery tickets, forbidden by statute, by the repeal of the prohibitory statute. *Roby v. West*, 4 N. H. 285. As to a *bona fide purchaser*, a deed executed in presence of only one witness, the statute originally requiring two, by a subsequent statute declaring such deeds sufficient. *Meigher v. Strong*, 6 Minn. 177; *Thompson v. Morgan*, Id. 292. A marriage of a female pauper, so as to render a town liable for supplies furnished her before the act. *Brunswick v. Litchfield*, 2 Greenl. 28. An assessment omitting a lot within the district declared to be benefitted. *People v. Lynch*, 51 Cal. 15; s. c., 21 Am. Rep. 667. A town vote to subscribe for railroad stock in excess of the sum authorized. *Marshall v. Silliman*, 61 Ill. 218. A similar vote in the absence of any legislative authorization. *Barnes v. Town of Lacon*, 84 Id. 461. An order of a board of supervisors for the opening of a road issued without conforming to a constitutional requirement. *Seihert v. Linton*, 5 W. Va. 57. An ordinance annulled for want of jurisdiction, notice of its intended passage not having been given to the persons affected. *Boice v. City of Plainfield*, 38 N. J. L. 95. A sale of a remainder in proceedings by life tenants, no authority existing for such a sale. *Maxwell v. Goetschius*, 40 N. J. L. 383; s. c., 29 Am. Rep. 242. A transfer by a board of supervisors, of money raised by a sale of swamp lands, to a railroad company to aid it in constructing a road, the transfer not having been authorized by popular vote. *Palmer v.*

Morrill v. St. Anthony Falls Water-Power Company.

Howard County, 46 Iowa, 61. A tax in excess of the authorized rate. *Railroad Co. v. Woodcock*, 18 Kans. 20. A decree obtained against legatees without service. *McDaniel v. Correll*, 19 Ill. 236. A municipal tax on property outside the city limits, by a subsequent statute giving power to extend such limits. *McManning v. Farrar*, 46 Mo. 376. A sale on execution after the return day. *Dale v. Medcalf*, 9 Penn. St. 103. A married woman's deed imperfectly executed. *Silliman v. Cummins*, 13 Ohio, 116.

MORRILL V. ST. ANTHONY FALLS WATER-POWER COMPANY.

(26 Minn. 223.)

Water and water-courses — riparian rights in navigable stream.

The State may authorize a riparian owner upon a stream not navigable at the point in question but becoming navigable below, to dam the stream and use the water for his purposes, but not to the injury of other riparian owners.

THE opinion states the case. The plaintiff had judgment below.

Benton & Benton, for appellant.

Shaw & Levi and *Lochren, McNair & Gilfillan*, for respondents.

GILFILLAN, C. J. Nicollet Island, above the Falls of St. Anthony, divides the Mississippi river into two channels—one, much the larger, flowing on the west side, and the other flowing on the east side of the island. Hennepin Island lies between these two channels, just below Nicollet Island, and extends down to and below the falls. Cataract Island is just below the falls, in the eastern part of the west channel, and near Hennepin Island. Plaintiffs are the owners of Cataract Island and the lower part of Hennepin Island. Defendant is the owner of the upper part of Hennepin Island. That island was granted by patent of the United States to one Ira Kingsley, from whom these parties claim title. The persons from whom defendant immediately claims its title had constructed a dam from a point near the head of Hennepin Island across the east channel of the river, and also a dam from the head of Hennepin to the foot of Nicollet Island, so as to prevent the flow of water between them, which they used until the construction of the present dam, in the year 1856.

Morrill v. St. Anthony Falls Water-Power Company.

In February, 1856 (Laws 1856, ch. 137), the legislature of the Territory of Minnesota incorporated the defendant, and authorized it (sec. 9) "to maintain the [then] present dams and sluices, and construct and maintain dams, canals and water-sluices, erect mills, buildings or other structures for the purpose of manufacturing in any of its branches, or improving any water-power owned or possessed by said company, * * * and may construct dams on the rapids above or below the Falls of St. Anthony, with side dams, sluices, and all other improvements in the Mississippi river, upon the property owned, or to be owned, by said corporation, which may be necessary for the full enjoyment of the powers herein granted: * * * *provided*, that nothing herein contained shall be so construed as to authorize said corporation to interfere with the rights of property of any other person or persons whatever." Subsequent to the passage of this act, the present dam of defendant was constructed. The effect of this dam is to diminish, especially in low water, the amount of water which would naturally flow along the west bank of plaintiffs' property. This bank is valuable for mill-sites, the powers being furnished by the water flowing along the bank. The plaintiffs' mill is propelled by this water. The river is not navigable in fact at the falls, nor at or near the premises in question, but is available and of great value for water-powers. The question in the case is as to the right of defendant to maintain its dam in such a manner as to interfere with this flow of water, to the injury of plaintiffs.

It is evident that defendant cannot, by virtue merely of its rights as riparian owner, stop the water which would naturally flow past the land of plaintiffs, so as to interfere with any use which they, as riparian owners, have the right to make of it.

The defendant makes, in substance, these propositions:

First. The Mississippi river is a navigable stream, the government owning the bed of the stream, and the owners of the banks owning only, at farthest, to low-water mark.

Second. If there be any riparian rights in such a stream, they are such only as relate to or are connected with navigation, giving to the owner only means of access from his own land to the river, for purposes of navigation.

Third. The exclusive right to any water-power is in the owner of the soil over which the stream flows—in this case the government—and in such power the owner of the banks has no property.

Morrill v. St. Anthony Falls Water-Power Company.

Fourth. The government, by the act incorporating the defendant, vested in it the right to the water-power, and the right to make it available by constructing such dams, etc., as it might see fit; and the dam being lawful, the plaintiffs, who have no property in the water-power in the river opposite their land, cannot complain if the dam interrupts such power.

We shall consider first, the proposition that the charter authorizes defendant to appropriate the water-power, as well opposite the plaintiffs' property as opposite the defendant's.

[Omitting this.]

It is now settled by the decisions of the court of last resort that under the acts of Congress providing for the survey and sale of the public lands, the patentees of lands bordering on the Mississippi river and its tributaries take only to the stream—at furthest, to low-water mark—leaving the title to the bed of the stream below low-water mark in the government. Those streams, below low-water mark, stand therefore in respect to the rights of the government and individuals in them, the same as tidal rivers. The rights of riparian owners are the same in both.

Owners of lands bordering on navigable rivers and lakes—those navigable in the common-law sense, and those navigable under acts of Congress—have rights in respect to the waters of such rivers and lakes, peculiar to such owners, and not possessed by others. *Dutton v. Strong*, 1 Black, 23; *Railroad Co. v. Schurmeir*, 7 Wall. 272; *Yates v. Milwaukee*, 10 id. 497; *Rose v. Groves*, 5 Man. & Gr. 613; *Duke of Buccleuch v. Metropolitan Board of Works*, L. R., 5 H. L. 418; *Metropolitan Board of Works v. McCarthy*, L. R., 7 H. L. 243; *Lyon v. Fishmongers' Co.*, L. R., 1 App. Cas. 662; *Delaplaine v. Chicago & Northwestern Ry. Co.*, 42 Wis. 214; s. c., 24 Am. Rep. 386; *Brisbine v. St. Paul & Sioux City R. Co.*, 23 Minn. 114. The case of *Atlee v. Packet Co.*, 21 Wall. 393, does not deny this proposition. It decides that the riparian owner, as such, has no right to construct piers in the navigable portion of such a river, and is entirely consistent with *Dutton v. Strong*, 1 Black, 23, which affirmed the right to construct a pier or wharf out to the point of navigability.

No case or text-book that we have found has attempted to define or limit the uses which the riparian owner may make of navigable waters, as those waters are seldom capable of any use except for navigation. Whenever specific riparian rights have come in ques-

Morrill v. St. Anthony Falls Water-Power Company.

tion, they have generally been connected with navigation, such as the right to construct and maintain wharves and piers, for access from the land to the water. Other cases, like *Railroad Co. v. Schurmeir*, 7 Wall. 272, and *Brisbane v. St. Paul & Sioux City R. Co.*, 23 Minn. 114, have mentioned the right to construct wharves and piers, not to confine riparian rights to such structures, but to illustrate the proposition that the owner of the banks has peculiar rights in the stream.

There is a class of cases, among them *Lansing v. Smith*, 4 Wend. 9; 21 Am. Dec. 89; *People v. Tibbetts*, 19 N. Y. 523; *Gilman v. Philadelphia*, 3 Wall. 713, which hold that riparian rights in navigable waters are subordinate to those of the State, and cannot in any manner interfere with the exercise of such public rights. These latter cases have no bearing on this, for here there is no attempt by the State to exercise the public power.

There are several cases in which the courts, *arguendo*, have indicated that the owner of the bank may make any use of the water adjoining his land not inconsistent with the public right, nor in opposition to the State. The only statement of a foundation for such a right, that we can find, is in the opinion of Lord SELBORNE, in *Lyon v. Fishmongers' Co.*, 1 L. R. App. Cas. 662, where he says, "the rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturæ*, because his land has by nature the advantage of being washed by the stream."

In *People v. Tibbetts*, 19 N. Y. 253, it is said: "The riparian owner may undoubtedly use the water passing or adjoining his land for his own advantage, so long as he does not impede the navigation, in the absence of any counter-claim by the State as absolute proprietor." In *Delaplaine v. Chicago & Northwestern Ry. Co.*, 42 Wis. 214; s. c., 24 Am. Rep. 386, "all the facilities which the location of his land with reference to the lake affords, he has the right to enjoy, for purposes of gain or pleasure. * * * These rights of user and exclusion are connected with the land itself, grow out of its location, and cannot be materially abridged or destroyed, without inflicting an injury upon the owner which the law should redress." And in *Canal Appraisers v. People*, 17 Wend. 571, Senator TRACY, in support of the right of the State to interfere with riparian rights without making compensation, said: "We may also take the case of the tide mills on Long Island, where the owners of the lands on the inlet of the sea possess an undoubted

Morrill v. St. Anthony Falls Water-Power Company.

right to use the water for their private emolument, and where the capability of availing themselves of this water-power may constitute the chief value of the adjacent land."

Dutton v. Strong, 1 Black, 23, affirmed the right of a riparian owner on a navigable lake to build and maintain for his own exclusive use and benefit, a pier into the lake as far as the point of navigability. The right to encroach upon the shallow water of the lake, by an exclusive appropriation even of the underlying soil, must rest upon the proposition that the riparian owner may make any use of the lake or river opposite his land not inconsistent with the public right.

As it seems to us, none of these opinions state the right too strongly. If the right exists *jure naturæ*, because the land has by nature the advantage of being washed by the stream, it is impossible to see how any such distinction as defendant claims can be made as to the peculiar uses which the riparian owner may make of the waters. The limit to the private right is imposed by the public right, and the private right exists up to the point beyond which it would be inconsistent with the public right.

We think the right in the riparian owner to put the water to any useful purpose may be sustained by considerations of public policy. It is certainly for the interests of the public that where the waters of a navigable stream may, without interfering with the public right, be put to some useful purpose, the right to so use them should exist.

We will state the rule at which we have arrived nearly in the language of the court in *People v. Tibbetts*, 19 N. Y. 253. The riparian owner may undoubtedly use, for any purpose, the water of a navigable stream passing or adjoining his land, for his own advantage, so long as he does not impede the navigation, in the absence of any counter-claim by the State or United States as absolute proprietor. The conclusion follows, that as between these parties, the plaintiffs have a right to the natural flow of the water past their land, and any interference with this flow, to their injury, is a wrong for which they are entitled to an appropriate remedy. To prevent such a wrong, injunction is an appropriate remedy.

We can see no elements of estoppel in the case. The defendant has acted with full knowledge of all the facts, and as must be presumed, knowing the law controlling the rights of the parties. If it has mistaken its rights, there is nothing in the case to show that

St. Paul and Sioux City R. R. Co. v. Minneapolis and St. Louis R. R. Co

it was led into such mistake by the plaintiffs. There is sufficient evidence to sustain the finding of the court below, upon the facts, in the particular complained of.

Judgment affirmed.

ST. PAUL AND SIOUX CITY RAILROAD COMPANY V. MINNEAPOLIS
AND ST. LOUIS RAILWAY COMPANY.

(25 Minn. 243.)

Bailment — Contract between connecting railways, for use of cars.

By agreement between the parties, connecting railway companies, the defendant was to receive the defendants' cars for delivery at a point on the defendants' line, and to return them in as good condition as when received, ordinary wear and tear by use excepted. Both parties were to share the profits of the freight so carried, and defendant was to pay the plaintiff a fixed sum for the use of its cars. Without fault on the defendants' part, certain of the plaintiffs' cars were destroyed by fire on the defendants' line, while being thus transported. *Held*, that the defendant was not liable.

ACTION for value of cars. The opinion states the case. The defendant had judgment below.

E. C. Palmer, for appellant.

I. Atwater, for respondent.

CORNELL, J. As appears by the complaint, this action is to recover the value of eight freight cars belonging to plaintiff, which were consumed, while in possession of the defendant, in the great fire that occurred in the milling district of Minneapolis, on the evening of the 2d day of May, 1878. The circumstances connected with the loss, as stated in the complaint, are briefly these: Soon after noon of that day, defendant, under a prior special agreement between the companies, first took possession of these cars from the plaintiff at Merriam Junction, where its line of railroad had a rail connection with that of the plaintiff. When received, they were already loaded with wheat, consigned to parties in Minneapolis, to which place they were hauled by the defendant over its line of road, during the afternoon of the same day, and in the same train.

When the fire first broke out in one of the mills, known as the

St. Paul and Sioux City R. R. Co. v. Minneapolis and St. Louis R. R. Co.

Washburn mill, which was about seven o'clock in the evening, all the cars were near by, three of them having been unloaded and left standing to wait the return train to Merriam Junction — one on the track of defendant's road, and two on a side track of the consignee, connected therewith, to facilitate the delivery of freight. The other five were still unloaded, and were then standing where they had been left by defendant for the purpose of being unloaded, awaiting the convenience of the consignee of the wheat to receive the same, one being upon the track of defendant's road, and the other four upon an extension of such track belonging to the consignee, and also built to facilitate the delivery of freight. It is alleged that the fire was not caused by any act or omission of the defendant, and there is no averment of any negligence on its part in leaving the cars where it did, or in connection with the loss. It is further alleged that the defendant came into possession of the cars in question by delivery from the plaintiff at said Merriam Junction, under and in pursuance of an agreement then existing between them, which is set out in the complaint in these words:

“ It has been and still is the custom, understanding and agreement between said companies (plaintiff and defendant), as to business common to both roads, that cars belonging to or furnished by one of said companies, when loaded with freight at points on the road of that company, or of a connecting company, consigned to a point on the road of the other company, shall be taken charge of at said Merriam Junction, and controlled exclusively by said other company, on and over whose road said freight was consigned, and transported to the point of destination and delivered; that said cars shall be returned loaded or empty, at the option of said latter company to said Merriam Junction, and there restored and redelivered to the former company owning or furnishing the same, in the same condition as when received, ordinary wear and tear excepted; that in all such cases the compensation charged for transporting such freight, as per bill of lading, was agreed to be and was divided between said companies upon a percentage to each of said gross sum. And it is further understood and agreed that each company over whose road the other company's cars shall run shall pay to the company owning or furnishing the same, as compensation for the use thereof in transporting said freight, one cent for each car per mile for every mile said cars shall run, loaded or empty, from and to said Merriam Junction, over the road of the company so using the same.”

St. Paul and Sioux City R. R. Co. v. Minneapolis and St. Louis R. R. Co.

The question presented concerns the liability of the defendant, upon the facts as thus stated in the complaint. It is contended that it is liable as a common carrier, but if not, as a bailee for hire. As respects its undertaking as to the cars under the agreement, the defendant cannot be regarded as a common carrier, within the definition of that term to be found in any text-book or authority. It neither contracted nor undertook to perform any service as a carrier in transporting them from one place to another, nor was it entitled to receive any compensation whatever for what it agreed to do in the way of taking and using them upon its road, and redelivering them to the plaintiff at Merriam Junction. It did not receive the cars for transportation for hire, but for use on its line of road in doing a business of transportation which was common to both roads, and in the profits of which both companies were to share. The compensation agreed upon was to be paid by the defendant to the plaintiff for such use, and not by the latter to the former as a reward for transportation. These facts alone show that the defendant's liability, if any, was not that of a common carrier.

Upon the assumption — which is undoubtedly correct — that the contract between the parties for the use of the cars was one of bailment for hire, for their mutual benefit, no recovery can be had, for the reason that it not only appears affirmatively that the fire was the proximate cause of the loss, and that it occurred through no fault of the defendant, but no negligence whatever is attributed to it in connection with the loss by any direct averment, or by any allegation of fact from which, as matter of law, it can be inferred. As the bailment was reciprocally beneficial to both parties, no liability could attach to the defendant by reason of the destruction of the property intrusted to it as bailee, unless it occurred through some negligence on its part amounting to want of ordinary care. This essential fact must be averred or shown in the complaint, for it is the very ground of the action. Its existence cannot be presumed. Story on Bailments (8 ed.), §§ 23, 410, and 410a.

Judgment affirmed.

Miller v. Smith.

MILLER V. SMITH.

(96 Minn. 248.)

Infancy — contract — repudiation — refunding.

An infant may disaffirm a chattel mortgage executed by him as security for borrowed money, and reclaim the chattels without refunding the money, it not appearing that he is able to repay.*

ACTION for conversion of chattels. The opinion states the point. The plaintiff had judgment below.

Clark & Soule and *M. J. Severance*, for appellant.

Daniel Rohrer, for respondent.

CORNELL, J. The complaint is not only for an alleged wrongful taking originally, and an unjust detention, but for a subsequent conversion of the property after demand.

[Minor matter omitted.]

The main point presented for adjudication however is upon the correctness of the court's refusal and charge upon the right of the plaintiff, because of his infancy, to avoid the mortgage he gave to the defendant, and reclaim the mortgaged property, without returning to the defendant the money which he borrowed of him, and for which the mortgage was given as security. The instruction asked was as follows: "The plaintiff, if a minor, could not disaffirm the sale by mortgage to the defendant, and reclaim the mortgaged property in question as received by it, without returning the money secured by it." This the court refused, and thereupon instructed the jury that, "if they should find the plaintiff to be a minor, still he may recover in this action, without returning or offering to return to defendant the consideration secured by the mortgage in question, or the money by him borrowed of defendant." To this refusal and instruction the defendant excepted, and now claims error on the ground that the plaintiff could not avoid the mortgage without repaying the loan made of defendant, and that is the only point presented for our consideration.

* See note, 25 Am. Rep. 30.

The facts bearing upon this point, as gathered from the evidence viewed in the most favorable light for defendant, are briefly these:

The plaintiff, an infant, being indebted to one Law upon a promissory note of \$40, part purchase-money of a pony, made a loan of the defendant which he mostly used in paying up that note. To secure this loan, he gave the defendant his note, secured by a chattel mortgage upon the pony and a yoke of oxen, of which the note and mortgage in controversy are renewals. The amount of this last note and mortgage is \$70 principal, due in two months, and drawing twelve per cent per annum interest. This sum of \$70 actually included \$12.70 for discount, commission, charges and expenses, so that plaintiff realized on his loan only \$70, less that sum. It is recited in the mortgage that the pony was bought of one Law for \$65, and the cattle of one Funk for \$125, and that they had been paid for. No delivery of the mortgaged property was ever made by the plaintiff to defendant, but they were taken from his possession without consent, upon default in the conditions of the mortgage, and sold on foreclosure, the defendant bidding them in himself, when plaintiff gave notice of his disaffirmance of the note and mortgage, and demanded possession of the property.

The plaintiff testifies that he used the pony for herding, and the cattle for plowing and breaking. Aside from this, there was no evidence tending to show the plaintiff's business or occupation or bearing at all upon his condition or circumstances in life. Upon these facts it is clear that the mortgage was not one for securing the purchase-money of mortgaged property bought of the mortgagee, as was the case in *Cogley v. Cushman*, 16 Minn. 397, 402, cited by defendant; neither was it a contract of security for necessities, nor for moneys to be used in buying them. A pony is not within the class of necessities, as that term, in its legal sense, is ordinarily used and applied. *Rainwater v. Durham*, 2 Nott & McCord, 524; *Smithpeters v. Griffin*, 10 B. Monr. 259; *McKanna v. Merry*, 61 Ill. 177; *Merriam v. Cunningham*, 11 Cush. 40. It can never be so regarded, except perhaps in a case where from some special circumstances, its use to the infant can be deemed essential in serving some of the purposes of an article of necessity, by supplying some of his actual wants and needs, regard being had to his situation and condition in life. If the existence of such circumstances is claimed in any case, the burden of showing the fact is upon the

Miller v. Smith.

party making the claim. It will not be presumed as against the infant. 2 Greenl. Ev., § 364.

In the case at bar no such special circumstances were shown, and there was no evidence tending to show that the plaintiff needed a pony for any use beneficial to himself. The mere fact that he used it for herding was not enough. It does not appear that he used it as a means of support, or that his needs or necessities required it. His note to Law was not therefore a binding obligation upon him, and the note and mortgage given to defendant, for money with which to pay it, cannot be upheld upon any principle applicable to the executory contracts of infants for necessities. They stand upon no better footing than like obligations of an infant, given for borrowed money, payable at a future day, without any delivery by him of the property covered by the mortgage to the mortgagee. As such they were voidable at the option of the infant, at any time during infancy, or within a reasonable time thereafter (*Stafford v. Roof*, 9 Cow. 626; *Chapin v. Shafer*, 49 N. Y. 407; *Randall v. Sweet*, 1 Den. 460); and it may well be questioned whether the illegal exactions which the defendant in this case retained, for discount, commission and expenses, out of the sum for which the plaintiff gave his note and mortgage, drawing interest at twelve per cent per annum, did not render the whole transaction absolutely void as against the infant. It was clearly inequitable and disadvantageous to his interests. But whether void or voidable only, is perhaps an immaterial inquiry, for the reason that the point of the defendant's objection to the refusal and instruction does not rest upon the proposition that the plaintiff could not legally avoid the note and mortgage in question, and reclaim his property, but that he could not do so without returning the amount of the loan.

If an infant can borrow money upon mortgage security upon his property, without any reference to his necessities, and cannot, upon reaching the age of legal discretion and capacity, or before, repudiate the transaction, except upon the condition of returning the amount of the loan whether he has it or not, this privilege, which the law accords to infancy for its protection, will generally be of little benefit. Under the operation of such a rule, money-lenders would soon become permanently possessed of the property of infant spendthrifts, for with them the temptation to borrow for immediate gratification is generally too great to be resisted. Its adoption as

Wilson v. Northern Pacific R. R. Co. McIntosh v. Lytle.

a rule would be in violation of the principle of protection that underlies the whole doctrine of the law pertaining to the dealings and contracts of infants.

In the case at bar it is not shown that the plaintiff retained any portion of the borrowed money at the time he gave notice of disaffirmance to defendant, and demanded a return of his property; but it affirmatively appears that he had already spent most of it in taking up the Law note. Under these circumstances, an offer to return the loan or to pay it was not necessary to enable him to reclaim his property, or to maintain this action. *Manning v. Johnson*, 26 Ala. 446; *Walsh v. Young*, 110 Mass. 396; *Chandler v. Simmons*, 97 Mass. 508.

As the plaintiff has remitted from the verdict the amount found for damages for the detention of the property, the consideration of defendant's last point is unimportant and unnecessary.

Order affirmed.

WILSON V. NORTHERN PACIFIC RAILROAD COMPANY.

(23 Minn. 278.)

Negligence — contributory — jumping off train to avoid collision.

It is not necessarily negligent in a passenger to jump from a rapidly moving railway train, in the attempt to escape from an impending collision.

THIS is sufficiently reported in note, *ante*, 384.

MCINTOSH V. LYTLE.

(23 Minn. 391.)

Negotiable instrument — check — no payee.

An order for the payment of money, "to order of, on sight," drawn on bankers, without specifying any payee or leaving any blank for the insertion of his name, is not a check, and no action lies on it for non-payment.

McIntosh v. Lytle.

ACTION on an order for the payment of money. The opinion states the case. The defendant had judgment below.

Lamprey & James, for appellant.

Gilman & Clough, for respondent.

GILFILLAN, C. J. Action on a writing as follows:

“\$200.

ST. PAUL, MINN., *January 22, 1879.*

“DAWSON & CO., BANKERS: Pay to the order of, on sight, two hundred dollars, in current funds. E. LYTLE.”

When presented to Dawson & Co., they refused payment, having been instructed so to do by the defendant.

A check must name or indicate a payee. Checks drawn payable to an impersonal payee, as to “bills payable” or order, or to a number or order, are held to be payable to bearer, on the ground that the use of the words “or order” indicates an intention that the paper shall be negotiable; and the mention of an impersonal payee, rendering an indorsement by the payee impossible, indicates an intention that it shall be negotiable without indorsement — that is, that it shall be payable to bearer. So when a bill, note or check is made payable to a blank or order, and actually delivered to take effect as commercial paper, the person to whom delivered may insert his name in the blank space as payee, and a *bona fide* holder may then recover on it.

These cases differ essentially from the one at bar. In the latter case the person to whom delivery is presumed, in favor of a *bona fide* holder, to have had authority to insert a name as payee. In the former cases the instrument is when it passes from the hands of the maker, complete, in just the form the parties intend. But in this case there is neither a blank space for the name of the payee, indicating authority to insert the payee’s name, nor is the instrument made payable to an impersonal payee, indicating a fully completed instrument. It is claimed that the words “on sight” are such impersonal payee. They were inserted however for another purpose — to fix the time of payment, and not to indicate the payee. It is clearly the case of an inadvertent failure to complete the instrument intended by the parties. The drawer undoubtedly meant to draw a check, but having left out the payee’s name, without inserting in

Conrad v. Lane.

lieu thereof words indicating the bearer as payee, it is as fatally defective as it would be if the drawee's name were omitted.

Judgment affirmed.

CONRAD V. LANE.

(36 Minn. 389.)

Infancy — repudiation — fraud.

An infant is not estopped from pleading infancy to an action for the price of goods, not necessities, by the fact that he represented himself to be of age when he bought the goods, and the seller relied on that representation. (See note, p. 418.)

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

Williams & Davidson, for appellant.

McCluer & Marsh, for respondents.

BERRY, J. This is an action in the nature of *assumpsit*, in which the plaintiffs seek to recover the reasonable value of certain merchandise sold and delivered to defendant. It was tried by the municipal court without a jury. The court finds, that in 1874, the plaintiffs sold and delivered to defendant, then an infant, merchandise (not necessities) of the value of \$214.81, upon which there remains a balance of \$131.81; that defendant was then engaged in business in his own name and for his own benefit, holding himself out to be of age, and that on the faith of such holding out, the goods mentioned were sold and delivered to him. Defendant became of age on January 31, 1877.

As a conclusion of law the court finds that the defendant is estopped to set up his infancy as a defense. This is unsound. The familiar rule which, in general, disables an infant from binding himself by contract, is founded upon the idea, that as a general thing, persons are, by reason of immaturity and inexperience, incompetent and unfit to judge of the nature of a contract, and of the propriety of entering into it, before the age of legal majority;

Conrad v. Lane.

if any thing can be said to be the policy of the law, this rule is beyond question a part of the policy of the law respecting infants. To make an exception to the rule in cases in which the infant has, at the time of making an alleged contract, represented himself to be of age, would be a manifest infringement upon this policy of the law — a disregard of the reasons upon which it is founded, and of the purpose which it has in view, viz., to protect the infant from being drawn into contracts which it is not necessary for him to make, and of which he is not capable of judging. In our opinion no such exception should be or is allowed.

This view is in accordance with the great weight of authority. *Merriam v. Cunningham*, 11 Cush. 40; *Burley v. Russell*, 10 N. H. 184; *Gilson v. Spear*, 38 Vt. 311; *Studwell v. Shapter*, 54 N. Y. 249; *Ewell's Lead. Cas.* 219, and note; *Benjamin on Sales*, 18.

[Minor matter omitted.]

Judgment reversed.

NOTE BY THE REPORTER. — To the same effect is *Whitcomb v. Joselyn*, 51 Vt. 79; s. c., 31 Am. Rep. 578. But compare *Ray v. Tubbs*, 50 Vt. 688; s. c., 28 Am. Rep. 519. Mr. Schouler says (Dom. Rel. 564): "The courts will hold an infant liable for what are substantially his torts, but not for mere violations of a contract, though attended with tortious results, and though the party ordinarily has the right to declare in tort or contract at his election." "Therefore was it held that where a boy hired a horse and injured it by immoderate driving, this was only a breach of contract for which he was not liable." Citing *Jennings v. Ruepull*, 8 T. R. 385. "But a more equitable principle pervades the later cases. Citing *Towne v. Wiley*, 23 Vt. 365; *Houser v. Thwing*, 3 Pick. 492. These were cases of abuse of horses hired by the infant to go to a particular place, and driven elsewhere, and are put on the ground that by violating the bailment he converts the property. Mr. Schouler continues: "The plea of infancy has long been considered, both in England and this country, a good defense to an action for fraudulent representation and deceit. Thus, the rule is that an infant who falsely affirms goods to be his own, and that has a right to sell them, and thereby induces the plaintiff to purchase them, is not responsible. Still more frequently has it been held that for a false and fraudulent representation that he was of full age, there is no remedy against the infant; whether money were advanced or goods were intrusted to him on the strength of such representation." Citing *Prescott v. Morris*, 32 N. H. 101; *Morrill v. Aden*, 19 Vt. 505; *Johnson v. Pye*, 1 Sid. 258; *Price v. Hewitt*, 8 Exch. 148; *Burley v. Russell*, 10 N. H. 184; *Conroe v. Birdsall*, 1 Johns. Cas. 127; *Merriam v. Cunningham*, 11 Cush. 40; *Brown v. McCune*, 5 Sandf. 224.

Prescott v. Morris, *supra*, holds that infancy is a good defense to an action on the case for deceit and false warranty in the sale of goods. In *Morrill v. Aden*, *supra*, it was held that in an action for the price of a horse, the defendant, pleading a breach of warranty, cannot preclude the plaintiff from setting up in reply that he was an infant when he made the warranty. *Price v. Hewitt*, *supra*, recognizes the doctrine laid down by Mr. Schouler, the action being for false and fraudulent representation. *Conroe v. Birdsall*, *supra*, was an action on a bond, and it was held that the obligor might avoid it by the plea of infancy, although he fraudulently represented at the time of execution that he was of age. The court said: "If an allegation like the present were ever permitted to destroy an infant's right of avoiding contracts, not one in a hundred of his contracts would be placed in his power to avoid, for nothing would be easier than to prevail on the infant to make a declaration which might be shown as evidence of deliberate imposition on his part, though prompted solely by the person intended to be benefited by it." The same doctrine was ap-

plied in *Brown v. McCune*, *supra*, an action for the price of goods sold. In this case the court said: "In nearly every case where litigation has ensued in consequence of the contracts of infants, such contracts have been made either on the express statement or the tacit assumption that such infants were of full age; and in the latter instance the suppression of the truth is as base as the falsehood in the former. Yet there is no case to be found in which it has been held that the infant on such a statement or assumption was bound by his contract. * * * A contrary doctrine would overturn the whole law relative to the contracts of infants. From holding that an infant was estopped by a falsehood as to his age, the next step would be to hold that he was estopped by a suppression of the fact that he was under age, when he was silent on that point, when he knew that the party with whom he was contracting supposed him to be of age. There is no difference in principle between the direct and the inferential falsehood; the one is as fraudulent as the other."

Burley v. Russell, 10 N. H. 184, is directly in point and supports the principal case. It distinguishes *Fitts v. Hall*, 9 N. H. 441, which holds that "an infant is liable, in case, for a fraudulent affirmation that he is of age, whereby another is induced to enter into a contract with him, if he afterward avoids the contract by reason of his infancy." *Merrill v. Cunningham*, 11 Cush. 40, supports the principal case, and *obiter*, doubts the doctrine of *Fitts v. Hall*, *supra*. In *West v. Moore*, and in *Green v. Greenbank*, 2 Marsh. (Eng.) 435, it was held that infancy is a bar to an action for a fraudulent warranty on the sale of a house. So in *People v. Kendall*, 26 Wend. 401, NELSON, C. J., said *obiter*: "It is well settled that a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort, in order to charge the infant by a change of the remedy."

In *Studwell v. Shafter*, 54 N. Y. 249, the court said: "It is true that it is alleged in the complaint that the defendant in making his purchases and in obtaining credit therefor, made representations to the plaintiffs as to his means of payment and the prosperous condition of the business in which he was engaged; and then it is averred that said representations were all made with intent to induce the plaintiffs to part with their goods and give the defendant credit therefor; and that they, relying upon such representations, parted with their goods and gave him credit therefor on the strength of such representations, which they charged to be false and untrue. Giving full effect to those allegations, they are insufficient to charge the defendant with a *legal liability* on the *contracts* which the plaintiffs were, by those representations, induced to enter into with him. They do not seek in this action to recover damages resulting from such representations on the ground of their falsity, but to *enforce the agreements or contracts of purchase* made by the defendant from time to time. Indeed they do not allege that the statements made by the defendant to them in relation to his means and business were so made with the intent to deceive or defraud them, nor with the intention at the time of not paying for the goods that should be sold to them, but that what was stated was said with the object of inducing them to deal with him as a purchaser on credit. Is this different in principle from a representation that he was of full age? That clearly would not have made him liable. The fact that a party is actually engaged in commercial business, thus holding himself out to the public as competent to contract, is as full and expressive a declaration to all persons with whom he is dealing that he is of age, as a statement of that fact is to a single individual. If, under such circumstances, an infant can be held liable on his contracts, he would be deprived of all the protection which the law intended to give him."

In *Wood v. Vance*, 1 N. & McC. 197, however it was held that an action of deceit will lie against an infant on a warranty on the sale of a horse, even though the form of an action is *ex contractu*, the substance being *ex delicto*. No expressed consideration of the question is shown. And in *Ex parte Unity Joint Stock Banking Association*, 3 De G. & J. 63, where an infant engaged in trade, wishing to borrow money, falsely and fraudulently represented that he was of age, it was held that proof of the loan was properly admitted in bankruptcy. This was put on the ground of equitable powers and jurisdiction. And as payment to the infant falsely representing himself of age is a discharge. *Overton v. Barrister*, 3 Hare, 508; *Stikeman v. Dawson*, 1 De G. & S. 90.

State v. Lavake.

STATE V. LAVAKE.

(28 Minn. 526.)

Criminal law — indictment — “one pint” less than “five gallons.”

Under a statute punishing the sale of spirituous liquors in quantities “less than five gallons,” an indictment for selling “one pint of brandy” is valid.*

CONVICTION of illegally selling spirituous liquors. The opinion states the case.

Chas. M. Start, attorney-general, for State.

Mathews & Andrews, for defendant.

BERRY, J. The following indictment was found against the defendant, viz.:

“THE DISTRICT COURT FOR THE COUNTIES OF LYON AND LINCOLN, AND STATE OF MINNESOTA.

“*The State of Minnesota*, plaintiff, v. *Lewis Lavake*, defendant.

“Lewis Lavake is accused by the grand jury of the counties of Lyon and Lincoln, by this indictment, of selling and disposing of spirituous, vinous, fermented and malt liquors, in a less quantity than five gallons, without first having obtained a license therefor, committed as follows: The said Lewis Lavake, on or about the 15th day of November, A. D. 1879, at the town of Lake Benton, in said county of Lincoln, did sell and dispose of, to one Beckley Wolcott, one pint of malt liquor, to wit, beer, of the value of ten cents; one pint of gin, of the value of ten cents; one pint of brandy, of the value of ten cents; one pint of whisky, of the value ten cents,—he, the said Lewis Lavake, not having a license to sell said liquors,—contrary to the statute in such case made and provided, and against the peace and dignity of the State of Minnesota. Dated at Marshall, in the county of Lyon and State of Minnesota, the 4th day of December, A. D. 1879.

“W. S. DIBBLE,

“*Foreman of the Grand Jury.*”

*See contra, *Arhintrode v. State* (67 Ind. 267), 33 Am. Rep. 86, and note, 88.

State v. Lavake.

The defendant having been convicted, the case has been certified here for our opinion upon four objections to the indictment.

[Omitting the first.]

The second objection to the indictment is that it does not charge the quantity of liquor sold and disposed of to be less than five gallons. Irrespective of the statement, in its accusing part, of a sale and disposing "in a less quantity than five gallons," the body of the indictment charges the selling and disposing of "one pint of brandy." The statute (Gen. Stats. 1878, ch. 108, § 10) provides that an "indictment is sufficient if it can be understood therefrom * * * that the act or omission charged as the offense is clearly and distinctly set forth, in ordinary and concise language, without repetition;" and, as held in *State v. Munch*, 22 Minn. 67, the meaning which ordinary use attaches to words not technical will be given to them in an indictment. In common understanding, a charge of a sale of a pint of brandy means a sale of that particular quantity and not of more. That a pint is less than five gallons is a part of the English language.

[Omitting other matters.]

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

STATE EX REL. ATTORNEY-GENERAL V. COLLIER.

(72 Mo. 18.)

Office and officer — bribery — offer by candidate to perform duties for less than legal fees

A public offer by a candidate for public office to the electors, to perform the duties of the office for less than the legal salary or fees, invalidates his election. (*See note, p. 422.*)

QUO WARRANTO. The opinion states the point. The offers in question were made in public speeches by the candidate to the electors, his acceptance of the nomination upon a platform pledging his acceptance of less than the legal fees, and his running upon a ticket entitled “Low salary democratic county ticket.”

J. L. Smith, attorney-general, for relator.

Boulware, Snell & Flanagan, respondent.

SHERWOOD, C. J. The legal sufficiency of the information being questioned by the demurrer, requires at our hands an examination into such alleged sufficiency.

VOL. XXXVII—53

Every one will concede that it is of the highest importance that popular elections should be conducted in such a way as to exempt them, so far as the infirmities incident to human agencies will permit, from improper influences. Here the demurrer confesses that being induced by the offers of respondent, to take for his own use only \$1,200 out of \$2,600, the aggregate fees of the desired office of judge of Probate, two hundred of the voters and tax payers of the county, who would otherwise have voted for respondent's rival, changed their purpose and voted for respondent, who but for such offers and their acceptance, would never have been elected. These admissions of the demurrer throw the burden of the assumed lawfulness of his acts upon the shoulders of the respondent. The question arising upon the admitted facts is whether the means employed by him to secure his election were lawful means, means such as this court can sanction, when the respondent, called upon by our writ of *quo warranto* to disclose his title to the office of judge of Probate, discloses also that his title must, for its validity, ultimately rest upon the means of whose employment the State in her information complains.

In the recent case of *State ex rel. Newell v. Purdy*, 36 Wis. 213; s. c., 17 Am. Rep. 485, the question raised by this information was learnedly and exhaustively discussed, and in such a manner as to leave nothing to be desired, and the conclusion there reached that means similar to those employed in the present instance were not to be tolerated, and that the title to the office secured thereby would be declared invalid. There the contest was between two individuals as to whom was entitled to the office of County judge, the relator claiming it in consequence of the reception of twenty-three more votes than the incumbent, but the latter claimed, in his answer, that the salary of County judge was fixed at \$1,000; that relator being a candidate for the office, published and circulated through the county a promise addressed to the electors thereof, that if elected County judge, he would perform all the duties and furnish an office, and all other incidentals except the record books, for \$600 per annum during his term, and that solely by this offer one hundred voters of the county were induced to vote for relator, thus securing his election. This answer was held sufficient on demurrer.

I am unable to distinguish this case in principle from that one. Here, it is true, the result of the respondent's action, if he complies with his promise, will not be as there, the enriching of the county

State ex rel. Attorney-General v. Collier.

treasury by refraining from withdrawing therefrom a sum of money, thereby benefiting pecuniarily each tax payer in the county; but the legal effect of the offer of the respondent is in no wise different; for while he did not propose to enrich the treasury of the county, as in the Wisconsin case, he did propose to impoverish himself, and to benefit every suitor who might come before him in his judicial capacity, by diminishing his lawful fees to less than one-half their usual rate. In other words, he appealed, and the demurrer admits he was successful in that appeal, not to the fair and honest judgment of the voters touching his qualifications and fitness for the office to which he aspired, but to the cheapness with which he would discharge his judicial duties. He said to the voters in effect and with effect: "Elect me Probate judge of your county, and no suitor who comes before me shall ever be charged even half the fees which the law allows"; thus making the office which he sought not a matter of qualification but of bargain and sale.

It is not necessary in this case to show, as claimed by counsel for respondent, that he or those who voted for him have been guilty of the crime of bribery in its strict sense. In instances like the present, instances involving the freedom and purity of elections, that term possesses a broader significance. As is well said in the case above cited: "It may properly be employed to define acts not punishable as crimes, but which involve moral turpitude or are against public policy." And there the court held that though the answer did not contain allegations of fact showing that the relator or any of the voters of the county had been guilty of the criminal offense of bribery, yet that answer was sufficient, and that acts falling short of that crime in its more restricted and technical meaning would justify the rejection of votes cast for the party made successful by the employment of the unlawful means, and Hawkins' Pleas of the Crown is quoted from extensively, and fully supports the position taken, where he says: "Also, bribery sometimes signifies the taking or giving of a reward for offices of a public nature, and certainly nothing can be more palpably prejudicial to the good of the public than to have places of the highest concernment, on the due execution whereof the happiness of both king and people doth depend, disposed of, not to those who are most able to execute them, but to those who are the most able to pay for them; nor can any thing be a greater discouragement to industry and virtue than to see those places of trust and honor which ought to be the rewards

of those, who by their industry and diligence have qualified themselves for them, conferred on such who have no other recommendation but that of being the highest bidders ; neither can any thing be a greater temptation to officers to abuse their power by bribery and extortion and other acts of injustice than the consideration of the great expense they were at in gaining their places, and the necessity of sometimes straining a point to make their bargain answer their expectation." Vol. 1, ch. 27, § 3. Again, the learned author says: "It is of the utmost importance to the public welfare, that in the administration of the government, none but persons competent to perform the duties of their offices should be admitted into any department. But if the sale of office were allowed to those who have the patronage and appointment, it is evident that there would be the greatest danger of situations being filled not by those whose talents fitted them for the station, but whose purses enable them to obtain it. The sale of offices may therefore justly be ranked as an offense against the political economy of the State." Vol. 1, ch. 32, p. 748.

In *Tucker v. Aiken*, 7 N. H. 140, a similar view was taken concerning a practice which had obtained of putting up at public auction and disposing of the office of constable to the highest, and of collector to the lowest bidder ; the court there saying, in reference to the custom : "It has a tendency to divert the attention of the electors from the qualifications of the candidates to the terms on which they will consent to serve, and makes the choice turn upon considerations which ought not to have an influence." The doctrine in that case, so far as concerns public officers, met with approval in Massachusetts, the court, in *Alvord v. Collin*, 20 Pick. 428, saying : "We fully recognize the validity of the objection to the sale of offices, whether viewed in a moral, political or legal aspect. It is inconsistent with sound policy. It tends to corruption. It diverts the attention of the electors from the personal merits of the candidates to the price to be paid for the office. It leads to the election of incompetent and unworthy officers, and on their part to extortion and fraudulent practice to procure a remuneration for the price paid. Nor can we discover a difference in principle between the sale of an office for a valuable consideration and the disposing of it to a person who will perform its duties for the lowest compensation. In our opinion the same objection lies against both."

And the legislature of Massachusetts applied the principle now

being discussed in a still more marked manner in the year 1810. The town of Gloucester, though entitled to six representatives, for economical reasons was accustomed to return but two members, whose pay had by law to be furnished by the town. In that year, however for political considerations, it was deemed desirable that the entire number of representatives, to which the town was entitled, should be elected; whereupon several individuals, with a view to induce the town to elect a full delegation, gave a bond, for the use of the inhabitants, conditioned, that the whole expense of such a representation should not exceed the pay of two members. But it was held by the legislature that the election was void, though none of the members elected from the town had any agency whatever in procuring the execution of the bond. The Supreme Court of Wisconsin, after citing the above and other authorities, says: "The doctrine which we think is established by the foregoing authorities, and which we believe to be sound in principle, is that a vote given for a candidate for a public office in consideration of his promise, in case he shall be elected, to donate a sum of money or other valuable thing to a third party, whether such party be an individual, a county or any other corporation, is void."

We must regard the cases above cited as conclusive of this one, and reiterate the statement that the offers in this case made by respondent differ in no essential particular from the Wisconsin case; the offers in each case are equally deserving of condemnation, and were in spirit and purpose the same. For if bribery in its larger sense, in its application to election cases, is the promise by the candidate to donate, if elected, a sum of money or other valuable thing to a third party, the promise in the case at bar ought to be held as falling within the same category, since though the suitors who may have to appear before the candidate when judge of Probate, cannot in the nature of things be designated, yet the corrupting tendencies of the offer remain the same; remain to swerve the voter from his duty as a citizen; to blind his perceptions as to the sole question he should consider, the qualifications of the candidate, and to fix them upon considerations altogether foreign to the proper exercise of the highest right known to freemen, the right of suffrage; a right upon whose absolutely free and untrammelled exercise depends the perpetuity of our republican institutions. The transaction of which the State in the present instance complains may have been entered into with laudable motives, but it is, as we think has

State ex rel. Attorney-General v. Collier.

been successfully shown, decidedly demoralizing in its tendencies, and utterly subversive of the plainest dictates of public policy. The maxim in such cases should be: *obsta principiis*; and it is only by a rigid observance of this by the courts, that the purity of elections can be preserved. The legislature of this State has, as we are informed, at its last session enacted a statutory prohibition against the employment in elections, of agencies such as we have in the preceding pages condemned, thus giving legislative recognition to the principles herein enunciated. See Rev. Stat. 1879, p. 258, § 1478. Holding these views the information will be held sufficient in law, the objection taken thereto by the demurrer not well taken, and the respondent required to plead further.

All concur.

NOTE BY THE REPORTER.—The same doctrine was recognized in *Harvey v. Tama County*, 53 Iowa, 228. The following is an abstract of the decision: In an action against a county for services as deputy county treasurer, defendant set up that such deputy had executed and filed a release for such services, wherein it was set forth that he had been fully paid. Plaintiff replied that such release was filed previous to the holding of an election for county treasurer, without consideration, in order to induce electors to vote for the then incumbent of the office who was a candidate for re-election. *Held*, that the release could not be avoided, but constituted a valid defense. The court remark: The release imports a consideration, and operates as a discharge of the defendant, unless it can be shown that the release was given without consideration. The plaintiff, in order to show such want of consideration, alleges, and seeks to prove, in effect, that the release was executed for the purpose of bribing voters, and securing an election to a public office. It is well settled that the law will leave all who share in the guilt of an illegal or immoral transaction where it finds them, and will not lend its aid to enforce the contract while executory, nor interfere to rescind the contract and recover the consideration when executed. In *Inhab. of Worcester v. Eaton*, 11 Mass. 378; 7 Am. Dec. 155, the following language is employed: "It appears to be the settled law in England, and we are satisfied that it is also the law here, that where two parties agree in violating the laws of the land the court will not entertain the claim of either party against the other for the fruits of such an unlawful bargain. If one holds the obligation or promise of the other to pay him money, or do any other valuable act on account of such illegal transaction, the party defendant may expose the nature of the transaction to the court, and the law will say, 'Our forms and rules are established to protect the innocent and vindicate the injured, not to aid offenders in the execution of their unjust projects,' and if the party who has foolishly paid his money repents his folly and brings his action to recover it back, the same law will say to him, 'You have paid the price of your wickedness, and you must not have the aid of the law to rid you of an inconvenience which is suitable punishment for your offense.'" To the same effect is *White v. Hunter*, 23 N. H. 128. This doctrine, which is applicable to cases where the parties are *pari delicto*, must, *a fortiori*, apply to a case like the present, in which it does not appear that the defendant was a partaker in the unlawful purposes. See also, *State v. Church*, 5 Or. 375; s. c., 30 Am. Rep. 746; *Carrothers v. Russell*, 53 Iowa, 346; s. c., 36 Am. Rep. 222.

In *People ex rel. Bush v. Thornton*, New York Supreme Court, November, 1861, the defendant was a candidate for the office of county judge. The regular salary was \$2,500. During the canvass he issued and circulated a card offering if elected to perform the duties for \$1,200 and furnish coal and stationery for his office, and also executed a bond to the same effect, with sureties, undertaking to turn the balance of the salary over to the poor fund, if the supervisors should persist in raising it. The court held, reversing the decision below, that the promises and pledges made by Thornton to the electors of the

 Sherman v. Hannibal and St. Joseph Railroad Company.

county were reprehensible in the extreme, being against public policy and in fact criminal offers to bribe even by the common law ; but that they did not *per se*, and in the absence of all constitutional and legislative declaration, create, as a penalty, a disability to hold office. The court concludes therefore in the absence of constitutional or statutory provision so declaring, ineligibility to office or disability to hold office cannot be pronounced by the court because of bribery or an attempt to bribe electors ; that votes cast under the influence of a bribe, proved to have been so given, should not, on grounds of public policy and because of the criminality of the act, be counted, but that this goes to the count — to the allowance of the vote — and does not touch the question of disability to hold office because of bribery. "Whether a law declaring such disability would or would not be just and politic in this State," say the court, "is a subject for consideration by the legislative branch of the government. It is the business and duty of courts to enforce laws. They cannot make them, however desirable they may be, or however great the necessity for their existence."

 SHERMAN V. HANNIBAL AND ST. JOSEPH RAILROAD COMPANY.

(72 Mo. 62.)

Master and servant — negligence — infant on freight car without paying fare — injury while attempting to perform service.

An infant rode upon a freight car in a freight train, without the consent of his parents, and without the knowledge of the conductor, and without paying fare. The rules of the company prohibited the carrying of passengers without fare, or on freight trains except in the caboose. The conductor knowingly suffered him to remain on the freight car. A brakeman, without authority, set him at a dangerous service on the car, in trying to perform which he was injured. *Held*, that the company was not liable.*

ACTION of damages for personal injury by negligence. The opinion states the facts. The plaintiff had judgment below.

Geo. W. Easley, for appellant.

S. Turner, for respondent.

HOUGH, J. The petition in this case alleged the minority of the plaintiff and the appointment by the Probate Court of Livingston county of Ellen Sherman as his guardian. The appointment of the guardian is specifically denied in the answer and the record fails to show that any evidence was offered on that subject. Following the decision of this court in the case of *Porter v. Hannibal*

* Compare *Penn. R. Co. v. Langdon*, post. To same effect *Flower v. Penn. R. Co.* (69 Penn. St. 210), 8 Am. Rep. 251; *N. O., etc., R. Co. v. Harrison* (48 Miss. 112), 12 Am. Rep. 36.

Sherman v. Hannibal and St. Joseph Railroad Company.

& *St. Joseph R. R. Co.*, 60 Mo. 160, the judgment must, for this cause, be reversed.

As the case must be retried, it will be proper to make some observations upon the law of the case as presented by the record now before us. The evidence taken at the trial is preserved in the bill of exceptions in the following form: 'The plaintiff introduced evidence tending to prove that the plaintiff got on a freight train of defendant at Chillicothe, about October 6, 1875, without the knowledge or consent of his parents; that he rode on said car some ten miles when he was discovered, being still in Livingston county, by a brakeman on said train, when he was told by the brakeman if he wanted to ride he must help brake, and placed him at a brake and instructed him in the signals when to brake and signal the engineer; and when he got to Cameron he was told that if he wanted to ride to St. Joe he must help coal up; that the said brakeman permitted him to ride on said train, and not in the caboose car attached to the train for the purpose of carrying passengers, till the train arrived at Cameron, a point forty miles west of Chillicothe; that at Cameron the plaintiff, who was thirteen years and ten months old, and a bright capable boy of his age, was directed by said brakeman to assist in coaling up the engine, which he did; that when it was coaled up, the brakeman told the boy to get on top of a certain freight car if he wanted to ride to St. Joseph, which he did; and while riding on top of said train, and about one mile from St. Joseph, and in Buchanan county, the brakeman, by signs, directed the plaintiff to adjust some boards on a car, which boards were falling off; that while plaintiff was in the act of so adjusting said boards, one of them striking on and against a post hit and threw plaintiff off the train, which was then in rapid motion, and broke his leg, seriously injuring him for life; that the conductor of said train knew plaintiff was on the train at Cameron and afterward to the time of the accident, but never spoke to him or gave him any directions in any way.

Defendant offered evidence tending to show that the conductor had exclusive control of the train and all persons on it; that plaintiff never paid any fare; that he secreted himself when he got on the train; that no employee of defendant had any authority from defendant to carry passengers unless they paid their fare, and never to permit any person to ride on any part of their train except in the caboose attached to the train for the purpose of carrying pas-

Sherman v. Hannibal and St. Joseph Railroad Company.

sengers ; that this train had a caboose attached ; that all conductors and brakemen had been instructed never to carry any person without he paid his fare, and never to carry any person on a train other than in the caboose ; that the brakeman had exclusive control of coaling up at Cameron.

It may be conceded that the plaintiff is to be regarded as a passenger at the time he was injured. The train being one on which passengers were allowed to be carried, although the plaintiff boarded the train without the permission or knowledge of the conductor, yet as the conductor, after he became aware of his presence on the train, suffered him to remain, he was entitled to the same protection as if he had paid his fare. *Wilton v. Middlesex R. R.*, 107 Mass. 108 ; s. c., 9 Am. Rep. 11.

It is plain however from the testimony, which we have inserted at length, that the plaintiff was not injured simply by reason of his being carried as a passenger in a dangerous position, in violation of the rules of the company, but in consequence of the order of the brakeman to him to adjust some loose boards on one of the cars in the train, in the execution of which order he was thrown from the train and injured. This order of the brakeman was clearly the proximate cause of the injury. But for this order and the attempted execution of it, it does not appear that the plaintiff would have been injured, as the train seems to have gone through in safety. Whether the company is responsible for the consequence of the brakeman's request to the plaintiff to adjust the loose boards, is the sole question to be determined.

It is well settled that to make the master liable for the tortious act of his servant the act causing injury must have been in the line of the servant's duty and within the scope of his employment. Here the testimony shows that the brakeman had no control whatever over any person on the train and no concern with them. The testimony is, "that the conductor had exclusive control of the train and of all persons on it." The control assumed by the brakeman over the plaintiff, and his directions to him to render various services on the train, and especially the service in which he was injured, were wholly unwarranted and unauthorized, and the master cannot be held liable for the consequences of such acts. When an act done by a servant is within the scope of his employment, the master will be liable although the servant does not obey his orders as to the manner of its performance. But it was no part of the

 Ex parte Brown.

duty of the brakeman, so far as this record shows, to employ or to direct any person, much less a passenger, to perform any service on the train, and if without such authority he negligently led the plaintiff into danger such negligence is his own and cannot be imputed to the master. Nor does it appear that the conductor was aware of the misconduct of the brakeman in this particular.

The youth of the plaintiff, as was said by AGNEW, J., in *Flower v. Railroad Co.*, 69 Penn. St. 216; s. c., 8 Am. Rep. 251, "may excuse him from concurring negligence, but it cannot supply the place of negligence on the part of the company, or confer authority on one who has none." *Snyder v. Hannibal & St. Joseph R. R. Co.*, 60 Mo. 413; *Towanda Coal Co. v. Heeman*, 86 Penn. St. 418. [Omitting a statutory consideration.]

The judgment will be reversed and the cause remanded.

Reversed and remanded.

All concur.

EX PARTE BROWN.

(72 Mo. 83.)

Telegraph — messages not privileged — subpoena to produce.

An agent of a telegraph company is punishable for contempt in refusing to produce messages in possession of the company, before a grand jury, on proper process; but a subpoena *duces tecum*, merely describing such messages by the names of the senders and persons addressed, and as sent "within fifteen months last past," is not such process.

HABEAS CORPUS. The opinion states the case.

Edward T. Allen, and *J. G. Lodge*, for petitioner. Petitioner is a mere servant of the telegraph company, having no control over any message in the office of the company. All messages are in the possession of the company; and its rules prohibit the petitioner from delivering messages to any one except the person addressed. He cannot take them before the grand jury without disobeying the orders of the company. *Bank of Utica v. Hillard*, 5 Cow. 158, 419; *Crowther v. Appleby*, L. R., 9 C. P. 23; *Earl of Falmouth v.*

Ex parte Brown.

Moss, 11 Price, 455; *Attorney General v. Wilson*, 9 Simons, 526; *Lee v. Angas*, L. R., 2 Eq. 59; *Wright v. Mayer*, 6 Ves. Jr. 280; *McCann v. Beere*, 1 Hogan, 129; 2 Dan. Ch. Pl. and Prac. 1376; *Miles v. Dawson*, 1 Esp. 405; *Bateson v. Hartsink*, 4 id. 43; *Astin v. Evans*, 2 M. & G. 430; *LaFarge v. LaFarge Fire Ins. Co.*, 14 How. Pr. 30; *Woods v. DeFiganiers*, 16 Abb. Pr. 160; *Murray v. Walter*, 1 Cr. & Ph. 114.

J. L. Smith, attorney-general, for respondent. Telegraphic dispatches in the possession of the officers of the company are not privileged communications, and their production can be compelled as other writings. *Henisler v. Freedman*, 2 Pars. Sel. Cas. 274; *Scott & Jarn. on Tel.*, § 388, note; *State v. Litchfield*, 58 Me. 267; *Bank v. Bank*, 7 W. Va. 544; *U. S. v. Babcock*, 3 Dill. C. C. 567; *Ince's case*, 20 L. T. (N. S.) 421; *Ex parte Brown*, 7 Mo. App. 484; *Scott & Jarn. on Tel.*, § 377 *et seq.*; 5 Cong. Rec., pt. 1, 44th Cong., 2d Sess., pp. 325, 330, 352, 358, 439, 449, 452, 455, 476, 477, 512, 514, 602, 608, 629, 631, 678, 694.

HENRY, J. In the St. Louis criminal court, at the November term, 1879, a subpoena *duces tecum* was issued by the clerk of said court, commanding the petitioner to appear before the grand jury on the 17th day of November, 1879, to testify in a certain matter pending before said inquest, and then and there to produce any or all telegraphic dispatches, or messages, or copies of the same, then in the office of the Western Union Telegraph Company at St. Louis, Missouri, of which the petitioner was manager, described as follows: Dispatches between Dr. J. C. Nidelet and A. B. Wakefield, and William Ladd and J. C. Nidelet, and William Ladd and Dr. Nidelet, between Warren McChesney and A. B. Wakefield, between Warren McChesney and J. C. Nidelet, between the latter and John S. Phelps, between A. B. Wakefield and John S. Phelps, between the latter and William Ladd, and between Geo. W. Anderson and A. B. Wakefield, sent or received by or between any or all of said parties within fifteen months last past. The petitioner appeared before the grand jury in obedience to the summons, and having been duly sworn, in answer to questions propounded stated that he had in his custody such messages or copies thereof, as were described in the subpoena, if there were any such in the office of the company, but declined to search for such telegrams and produce them, on the

ground that he was but a servant of the company, and had no custody or control of any message or dispatch, except such as was given him by the company, which had forbidden by its rules managers and employees from furnishing copies of any original message or permitting such originals to be taken from the possession of the company, except by authority of one of its executive officers. These facts were reported by the grand jury to the judge of the criminal court, and being brought before the court, the petitioner, persisting in his refusal, was committed for contempt and taken in custody by the sheriff of St. Louis county, whereupon he applied to this court for a writ of *habeas corpus*, and we are called upon to determine whether the commitment was legal or not.

Telegraphic messages are not privileged communications. *State v. Litchfield*, 58 Me. 267. No statute of this State, or of the United States, has made them so. That mode of communication is of recent origin, and therefore the common law furnishes nothing but analogies for our guide. Telegraphic lines are not operated by the government, which is in no manner engaged in the business of transmitting telegraphic messages. It may enact laws in relation to them, as to other corporations, but has no business connection with them. On the other hand postal facilities were established by Congress; the mails are carried by the government through its own agents, and penal statutes protect communications sent through the mail. The entire postal system is under the control and management of the government. There is no statute of this State or principle of law which places a telegram on a different ground from that which any other communication occupies, made by one through another, to a third party, with respect to the liability of the confidant to be called as a witness to produce it or testify to it. There is no such analogy between the transmission of communications by mail, and their transmission by telegraph, as would justify the application to the latter of the principles which obtain with respect to the former; and certainly penal statutes in relation to the one cannot by the courts be declared applicable to the other. The facts that railroad train orders are generally communicated by telegraph, that a vast amount of trade and traffic is transacted through this medium, that it has become of almost equal importance in the commerce of this country, with the postal system, and that in a business sense, men are compelled to transmit communications by the telegraph, are for the consideration of the legislative branch

Ex parte Brown.

of the government in determining the propriety of placing telegraphic communications on the same footing with correspondence by mail, or declaring them privileged; but the annunciation of such a doctrine by the court would be an assumption of power which belongs to the legislative department.

“The right to resort to means to compel the production of written as well as oral testimony seems essential to the very existence and constitution of a court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed, with due effect, without them. And it is not possible to conceive that such courts should have immemorially continued to act on both, without great and notorious impediments having occurred, if they had been furnished with no better means of obtaining written evidence than what the immediate custody and possession of the party who was interested in the production of it, or the voluntary favor of those in whose custody the required instrument might happen to be, afforded.” Lord ELLENBOROUGH in *Amey v. Long*, 9 East, 473. This right of the court has not only been immemorially acted upon in England, but its exercise is of almost daily occurrence in this country.

The only ground therefore upon which the exemption of telegrams from this process of the court can be placed, is that they are privileged communications, and we cannot declare them to be such in the absence of a statute so providing. The transportation of packages and parcels by means of express lines, is becoming almost as great a necessity as that of sending communications by telegraph, and the two agencies are very frequently employed in intimate connection, and the argument which asserts the inviolability of telegrams, derived from a supposed analogy between the postal system and the telegraph, would as well apply to parcels or packages intrusted to the express company for transportation.

The rules of the company forbidding the petitioner from delivering telegrams or copies afforded no legal excuse for his refusal to produce the telegrams. Telegraph companies, it is true, are by section 13, Wagner's statutes, 325, subjected to a penalty for disclosing the contents of any private dispatch to any person other than the person to whom it is addressed, or his agent; but taken in connection with section 51, page 507, it is obvious that it is not to be construed as prohibiting such disclosure when it is required as evidence in a judicial proceeding. The latter section makes it a mis-

Ex parte Brown.

demeanor for any person connected with any telegraph line willfully to disclose the contents, or the nature of the contents, of any message intrusted to him for transmission or delivery, to any one to whom it is not addressed, except a court of justice, and in that exception we have a legislative recognition of the amenability of custodians of telegrams to a subpoena *duces tecum*, commanding their production. It follows, if the court has the right to compel their production, that the company cannot, by any rules it may adopt, exonerate its agents from obedience to the judicial mandate.

The only remaining question is, whether the messages, the production of which was commanded by the process, were described with sufficient accuracy, to justify the court in compelling obedience to it. The twenty-third section of our bill of rights declares: "That the people ought to be secure in their persons, papers, houses and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, can issue without describing the place to be searched or the thing to be seized, as nearly as may be, nor without probable cause, supported by oath or affirmation." We are not prepared to agree with the Court of Appeals that this section has "but little bearing upon the present question, except by way of argument and illustration;" but if it has no other bearing upon the question, the argument and illustrations drawn from it possess a cogency not to be despised.

The section declares that the people ought to be secure, in their papers, from unreasonable searches, and whether a subpoena *duces tecum* for papers, or search warrant for chattels, be issued, the spirit of that section demands that while in the latter case there must be probable cause, supported by oath or affirmation, with a description in the warrant of the place to be searched, or the thing to be searched for, in the other, it shall at least give a reasonably accurate description of the paper wanted, either by its date, title, substance or the subject it relates to, and that it shall be shown to the court or authority issuing the process that there is a cause pending in a court and that the paper is material as evidence in the cause. To permit an indiscriminate search among all the papers in one's possession for no particular paper, but some paper, which may throw some light on some issue involved in the trial of some cause pending, would lead to consequences that can be contemplated only with horror, and such a process is not to be tolerated among a free people. A grand jury has a general inquisitorial

Ex parte Brown.

power. They may ask a witness summoned before them, without reference to any particular offense which is a subject of inquiry, what he knows touching the violation of any section of the Criminal Code. Give such a body, in addition, the power to search any man's papers for evidence of some crime committed, and you convert it into a tribunal which would soon become as odious to American citizens as the Star Chamber was to Englishmen, or the Spanish inquisition to the civilized world.

Here, communications, at different times within a period of fifteen months, sent or received by the parties named, are called for. The date, title, substance, or subject matter of none of them is given, and it is utterly impossible that it could have been made to appear, without more, that any of the messages were material as evidence before the grand jury. Moreover, it not only called for all messages between the parties named, but for all which may have been sent or received by either of the parties, to or from, any person on the face of the earth. A compliance with the order might have resulted in the production of confidential communications between husband and wife, client and attorney, confessor and penitent, parent and child. Matters which it deeply concerned the parties to keep secret from the world, and of no importance or value as evidence in any cause, might thus be disclosed to the annoyance and shame of the only persons interested. Incidents in the lives of members of families which the happiness and welfare of the household require to be kept secret, might be exposed, and offenses not recognizable by the law, long since committed and condoned, brought to light and hawked through the country by scandal mongers, to the disturbance of the peace of society and the destruction of the happiness of whole households. It is no answer to this that the obligation of secrecy imposed by law on grand juries would prevent such exposure. It is enough to disturb and harass a man, that twelve of his neighbors, though sworn to secrecy, have acquired knowledge diminishing their respect for him, which they had no right to obtain, and they may be the very twelve men with whom, above all others, he most desired to be in good repute. Such an inquisition, if tolerated, would destroy the usefulness of this most important and valuable mode of communication by subjecting to exposure the private affairs of persons intrusting telegraph companies with messages for transmission, to

Ex parte Brown.

the prying curiosity of idle gossips, or the malice of malignant mischief-makers.

The power of a court of equity to compel a discovery by any party defendant to the suit, of any document in his possession, or fact resting in his knowledge, material to the issue on trial, bears an analogy to the subœpna *duces tecum*, and that power cannot be exercised to compel any discovery not material to the cause; and on that subject, Lord LOUGHBOROUGH, in *Shaftsbury v. Arrowsmith*, 4 Ves. 66, said: "Permitting a general, sweeping survey into all the deeds of a family, must be attended with very great danger and mischief. It may set up a title, not for the benefit of the plaintiff, but to the injury of the devisees, indulging a speculation to the prejudice of parties whose interest this court has no right to invade." Mr. Fonblanque in his work on Equity, says: "A plaintiff by this bill may without the least foundation impute to the defendant the foulest frauds, or seek a discovery of transactions in which he has no real concern; and when the defendant has put in his answer, denying the frauds or disclosing transactions (the disclosure of which may materially prejudice his interests), the plaintiff may dismiss his bill with cost, satisfied with the mischief he may have occasioned by the publicity of his charge, or the advantage he may have obtained by an extorted disclosure." In reference to this abuse of the proceeding he says: "The court alone can counteract it; and in vindication of its process, must feel the strongest inclination to interpose its authority." 2 Fonb. Eq. B. 6, ch. 8, § 1, note a. These observations are equally applicable to the subpoena *duces tecum*. The abuse of the power to compel a discovery is sedulously guarded against in equity jurisprudence, and yet ten-fold greater injury could be inflicted by means of a subpoena *duces tecum*, if it can compel a sweeping, indiscriminate production and inspection of the papers of any party to the suit, or witness in the trial. If our bill of rights had not guarded the citizen against such an abuse of a judicial process, we would be inclined to apply to this process the wholesome restrictions which equity jurisprudence has placed upon the power of a court of equity to compel a discovery.

The case of *Babcock v. United States*, 3 Dill. 567, relied upon as an authority, as to the sufficiency of the identification of the telegrams, supports the view it is cited to sustain; but with the highest respect for the learning and ability of the judges who granted the order for the subpoena in that case, we cannot agree with them.

Wright v. Bircher's Executor.

Their opinion, delivered by Judge DILLON, is totally at variance with our convictions on the subject. An interesting article on the questions discussed in this opinion, read by Henry Hitchcock, Esq., of the St. Louis bar, before the American Bar Association, published in the Southern Law Review, No. 4, vol. 5 (N. S.), has been of great service to us in our investigations, and is a valuable contribution on the subject. In the dissenting opinion of Judge LEWIS, of the Court of Appeals, in *Ex parte Brown*, the question on which he differed from his associates (the sufficiency of the identification of telegrams called for), is discussed with great ability and clearness. 7 Mo. App. 494. All the forms of this subpoena to be found in works on practice contain a particular description of the book, or paper or papers, the production of which is commanded, and this strengthens the position that a call for papers generally is insufficient. Our conclusion is, that the petitioner is entitled to his discharge from the custody in which he is held, and it is accordingly ordered that he be discharged. All concur.

WRIGHT V. BIRCHER'S EXECUTOR.

(72 Mo. 179.)

Lien — on after-acquired property — lease — rent.

A lease of a hotel in process of erection stipulated that all furniture and fixtures should be bound for the rent. It was to take effect at a future day. When signed, the hotel was unfurnished, but before it took effect there were furniture and fixtures in the hotel. The rent was payable monthly. *Held*, that a lien attached upon the furniture and fixtures for the full amount of rent reserved, and had priority over a mortgage given after the lease took effect, but before rent was in arrears, to one knowing of the stipulation.*

CLAIM of lien on goods. The opinion states the case. The plaintiff had judgment below.

M. L. Gray and J. M. Holmes, for appellant.

Charles B. Howry, W. H. H. Russell and W. L. Scott, for respondent.

* *First Nat. Bank of Alexandria v. Turnbull* (82 Gratt. 695), 34 Am. Rep. 791.

HENRY, J. This cause was submitted to the Circuit Court on the 6th day of March, 1877, upon an agreed statement of facts, in substance the following: Bircher was the owner of a six-story building in St. Louis, on the southeast corner of Sixth and Chestnut streets, adjoining the Laclede hotel, and on the 7th day of February, 1873, while work was in progress upon it to convert it into a hotel building, leased it to John W. and Walter Malin, to be used by them, when completed, as a hotel. The date of the lease was February 7, 1873. It was signed in duplicate, each of the two parties receiving one. At that date there were no fixtures or furniture in the building, it being then unfinished, but they were afterward to be placed in the building by the Malins, and were so placed in the month of July, 1873. The term for which the premises were leased was ten years, to commence on the — day of —, 187—, and the lessees agreed to pay an annual rent of \$32,000, in monthly payments of \$2,660.66 to be made on the last day of each month; and it was stipulated in the lease that all fixtures, furniture and other improvements should be bound for the rent and fulfillment of other covenants therein contained, on the part of the lessees, and any forfeiture for non-fulfillment of conditions therein might be enforced at any day or time however distant, after such failure or default should happen. The building and premises to be kept free of nuisances, and not to be underlet, except the basement, without the lessor's consent, under a penalty of forfeiture. The concluding stipulation of the lease was as follows: "This lease shall commence on the first of the month after the completion of said building, and the within blanks shall be filled that day. It is further agreed that connection can be made with the Laclede hotel."

The Malins were proprietors of the Laclede, which was furnished for hotel purposes; and after the completion of the Bircher building they used the two buildings in connection, and they were called and known as the Laclede-Bircher hotel. The Bircher building was completed about the 1st day of August, 1873, by which time the furniture and fixtures in controversy in this suit were placed therein by the lessees, and the blanks in the lease specifying the date of the commencement of the lease were then filled, and the instrument duly recorded. On the 9th day of February, 1874, John and Walter Malin, the lessees, borrowed of Nannie M. Wright \$25,000, and to secure their note given for the amount, executed a deed of trust conveying all of the personal property in the two build-

Wright v. Bircher's Executor.

ings to M. L. Gray, as trustee, said Nannie M. Wright then having actual notice of the provision of the lease stipulating for a lien by Bircher on the property in the Bircher building. Afterward, on the 26th day of May, 1875, they borrowed of said Nannie M. Wright an additional sum of \$10,000, and to secure their note for that amount executed another deed of trust conveying to said Gray the same property. Bircher entered and took possession of the property in the Bircher building, claiming a lien upon the goods for rent in arrear, and this is a controversy betwixt him and Nannie M. Wright, who insists that Bircher's lease failed to create a lien, either in law or equity, upon the property in dispute. The judgment of the Circuit Court was in favor of Bircher, and on appeal, was affirmed by the Court of Appeals, and is here on appeal from that judgment.

One of the principal questions discussed by counsel relates to the validity of a sale, or mortgage of goods and chattels not *in esse* at the date of the mortgage or sale. One might write a volume, if inclined to review all of the adjudged cases on the subject. We are not so inclined, and deem it necessary only to state what we regard as the conclusion reached by the best considered cases. It has been frequently and ably discussed, both in the English and American courts, and highly respectable authorities might be cited in support of either of the opposite views urged by the respective counsel here. The earlier English and American authorities, we think, sanction the doctrine contended for by the counsel of Nannie M. Wright. *Jones v. Richardson*, 10 Metc. 488; *Moody v. Wright*, 13 id. 17; *Gardner v. McEwen*, 19 N. Y. 125; *Head v. Goodwin*, 37 Me. 187; *Barnard v. Eaton*, 2 Cush. 294; *Winslow v. Merchants Insurance Co.*, 4 Metc. 306; *Codman v. Freeman*, 3 Cush. 806; *Otis v. Sill*, 8 Barb. 108; *Lunn v. Thornton*, 1 M., Gr. & Scott 379. The doctrine maintained in the most of these cases was clearly stated in *Otis v. Sill*, and was substantially "that a grant of goods, not in existence, or which do not belong to the grantor at the time of the execution of the deed, is void, unless the grantor ratify the grant by some act done by him with that view, after he has acquired the goods; that an assignment of property to be acquired in future, if valid in equity, is only valid as a contract to assign when the property shall be acquired, and is not an assignment of a present interest in the property, and if enforced in equity, can only be enforced as a right under the contract, and

not as a trust attached to the property as against the creditors of the assignor or mortgagor; that the mortgage of such subsequently-acquired property can only be regarded as a mere contract to give further mortgage on such property, binding on the mortgagor personally, and the only remedy of the mortgagee on such contract is as a general creditor."

The broadest contrary doctrine was announced by Mr. Justice STORY in *Mitchell v. Winslow*, 2 Story 630, in the following language: "It seems to me the clear result of all the authorities, that whenever the parties, by their contract, intend to create a positive lien or charge, either upon real or personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice, or in bankruptcy." This has been followed by this court in the case of *Page v. Gardner*, 20 Mo. 508; in New York, in the case of *Seymour v. C. & N. F. R. R. Co.*, 25 Barb. 305, in which *Otis v. Sill*, *supra*, was cited and distinctly disapproved; also in *Sillers v. Lester*, 48 Miss. 526; *Benjamin v. Elmira R. R. Co.*, 49 Barb. 441; *Brett v. Carter*, 2 Low. 458; *Morrill v. Noyes*, 56 Me. 458; and in England, in *Langton v. Horton*, 1 Hare, 549; *Holroyd v. Marshall*, 9 Jur. (N. S.) 213; *Whitworth v. Gaugain*, 3 Hare, 416; *Douglas v. Russell*, 3 Jur. 512; s. c., 1 Myl. & K. 488. The opinion of the court in *Morrill v. Noyes*, delivered by DAVIS, J., is an able review of the authorities, and states the doctrine more clearly and precisely than any other case to which our attention has been called. It does not recognize the validity of mortgages of mere contingencies, or sales or mortgages of property which "the mortgagors might purchase, if they should purchase any," but the sale or mortgage must relate to property then in the contemplation of the parties to be purchased or acquired by the vendor or mortgagor.

Hale v. Webb, 28 Mo. 408, is cited by appellant as establishing the proposition that the lien declared in the lease in question is void in equity, does not create a trust affecting the property. This is a misconception of the case. But one question was discussed in that opinion, and that was the effect of a clause in the mortgage which authorized the mortgagor to remain in possession of the mortgaged property, a stock of hardware, and continue his business as a hardware merchant, selling the goods, etc. The

Wright v. Bircher's Executor.

clause was held to invalidate the mortgage, and while the mortgage included the property then in store, as well as such as should at any time during the existence of the trust belong to the mortgagor, either in said store or any other store or place, there was no discussion as to the effect of that provision. NAPTON, J., did observe that: "The case of *Mitchell v. Winslow*, 2 Story, 630, referred to in the opinion of this court in *Page v. Gardner*, 20 Mo. 507, cannot be reconciled in all respects with the decisions of this court in *Brooks v. Wimer*, id. 506, and several subsequent cases reiterating the same doctrine. So far as the case (*Mitchell v. Winslow*) goes to sustain the judgment in *Page v. Gardner*, no exception is designed to be taken to it, as the opinion and judgment in that case are not supposed to conflict with the views expressed in *Brooks v. Wimer*." Now, the only question in *Brooks v. Wimer* was, as to the effect of a clause in the mortgage permitting the mortgagor to retain possession of the mortgaged goods and "dispose of them without any accountability to any one for the proceeds of the sale." This court held the mortgage fraudulent upon its face, while in *Mitchell v. Winslow* the contrary was maintained, and it is that portion of the opinion of Judge STORY which Judge NAPTON declared in conflict with *Brooks v. Wimer*. In *Page v. Gardner*, the other question discussed by Mr. Justice STORY in *Mitchell v. Winslow* was one of the questions under consideration (while the point upon which *Brooks v. Wimer* was decided was not before the court), and the views of Judge STORY were fully approved, and in *Hale v. Webb* Judge NAPTON expressly states "that no exception is designed to be taken to it," evidently referring to that portion of the opinion of STORY, J., which related to the mortgage of property to be acquired subsequently to the execution of the mortgage. We may therefore with confidence assert that the doctrine of this court on the subject is in perfect harmony with that announced in *Mitchell v. Winslow*, and we see no reason to depart from it.

It may also be observed that by the last stipulation of the lease it was to commence on the first of the month after the completion of the building, and blanks left in the lease for that day were to be filled when the lease commenced, and this was accordingly done. When the lease took effect the property was all in the building, and was sufficiently described in the lease to make the lien reserved effective in equity if not in law.

In any view however that may be taken of the case, Bircher had

a lien upon the property for the rent to become due by its terms. If a lien at law, then good against Mrs. Wright without regard to any notice to her other than that imported by the record of the lease. If in equity only, then equally good against her, because she had notice of the stipulation in the lease when she accepted her mortgages.

The position that the lien was only for rent that might at any time be in arrear, and there being none in arrear when the mortgages to Nannie M. Wright were executed, there was no lien in favor of Bircher at that time, cannot be maintained. By a fair construction of the lease the lien reserved was for the full amount of the rents, which by its provisions would accrue within the term for which the house was let. It was not to secure the first installment of rent which the lessees might fail to meet, only, as counsel contend, but each installment, and it created a lien as well for the last as for any preceding installment. The Court of Appeals, in its opinion delivered in the case, fully and satisfactorily disposed of that question, and therefore it is only necessary to state our conclusion on the subject. The judgment is affirmed.

Judgment affirmed.

All concurring.

HIATT V. WILLIAMS.

(73 Mo. 214.)

Contract — validity — promise to give real estate for support — devise of same by invalid will.

An oral agreement by a father to give his son a farm at his death, in consideration of a support for himself and his wife for their lives, being carried out by the son, is binding, and an invalid devise of the farm to the son does not defeat it.

SPECIFIC performance. The opinion states the case. The defendant had judgment below.

J. Halligan and T. W. B. Crews, for appellant.

NOPTON, J. The object of this suit was to procure a specific performance of an agreement, after the death of the person with whom the agreement is alleged to have been made, upon the ground that the plaintiff had fully performed on his part. The plaintiff

Hiatt v. Williams.

was the youngest son of Th. Hiatt, who had four children. In 1858, having provided for his other children, as he supposed; to each of his two daughters having given a share, and his son who went to California, some money, he agreed with plaintiff, his youngest son, that if he would remain upon the homestead and support his father and step-mother during their lives, and work the farm (180 acres) under the direction of his father, he would convey in fee the homestead to the plaintiff, but not to take effect till he and his wife were dead. This arrangement was claimed and proved. In 1861, the father, with a view to carry out this purpose, which he was told could be best effected by a will, made a will devising this land to the plaintiff. In the will, which was drawn up by defendant, Williams, who was a son-in-law of Hiatt, and a justice of the peace, no mention was made of his other children, and consequently, under our statute, it was a mere nullity. In 1866 this paper was delivered to plaintiff by his father, as answering the purpose of the two contracting parties. In 1870 the father died, and in 1873 the step-mother died, during which seventeen years the plaintiff lived on and worked the farm. These facts were stated in the petition and fully supported by the evidence. The Circuit Court however refused to enforce the contract, upon what ground and for what reasons does not appear. No brief has been filed on the part of the defendant in error, and we have been unable to conjecture upon what ground the decree dismissing this bill was based. The case seems to be identical in principle with the case of *Sutton v. Hayden*, 62 Mo. 101, and *Gupton v. Gupton*, 47 id. 37, though much stronger in facts than either. The attempt to execute the contract by a will would surely not place the plaintiff in any worse condition than he was before. The will was merely introduced in evidence to support the contract, and it was certainly very strong evidence to show the intent of the father, who doubtless supposed that it would accomplish his purpose. A verbal agreement of this sort, in case of performance on one side, was enforced in the case of *Gupton v. Gupton*. That case is in effect identical with the present, though infinitely less persuasive in its facts. for here there was an actual service of seventeen years. The judgment of the Circuit Court will be reversed, and that court directed to enter a decree in conformity with this opinion.

Judgment reversed.

The other judges concur.

WELSCH V. HANNIBAL AND ST. JOSEPH RAILROAD COMPANY.

(72 Mo. 451.)

Negligence — omission of flagman at railroad and highway crossing

A railroad company is not bound to station a flagman at a highway crossing, however dangerous, unless it is the custom of railroad companies to station one at such a crossing. (*See note, p. 443.*)

ACTION of damages for injury to personal property by negligence. The opinion states the case. The plaintiff had judgment below.

George W. Easley, for appellant.

Anderson & Boulware, for respondent.

NORTON, J. This is a suit for damages to plaintiff's horses and wagon, alleged to have been sustained at a crossing of a public highway in Marion county, by reason of defendant's negligence. The negligence averred was: 1. In not having a flagman or watchman at the crossing; 2. In not sounding the whistle or ringing the bell as required by statute; 3. That the servants and agents of defendant in charge of said train so carelessly and negligently propelled the same, and made such great noise and shrieks by blowing the steam whistle attached to the locomotive, that the horses were frightened and ran away, etc. The answer was a general denial. On the trial plaintiff obtained judgment for \$350, from which defendant has appealed.

The evidence tended to show that where the Palmyra and LAGRANGE road crossed the railroad, near the highway bridge across North river, the highway is cut out of the side of the rock bluff, gradually descending from the top of the hill, which is twenty-five or thirty feet high, till about twenty feet from the railroad, where it reaches the level of the railroad and crosses it at grade, that this road cut out of the side of the rock bluff was "very rugged and uneven," and wagons going along there make a great deal of noise; that from the top of the hill, nor down to the level of the railroad, in fifteen or twenty feet of the track, a train could not be seen; that plaintiff, about half-past ten o'clock in the day, knowing that

Welsch v. Hannibal and St. Joseph Railroad Company.

a passenger train was due at that hour, stopped, looked and listened for a train, but neither seeing one nor hearing the customary signals of an approaching train, drove his wagon and team forward and discovered a train about fifty yards from him as his horses stepped on the crossing; that plaintiff got across the track, and his horses becoming frightened by the sharp sounding of the whistle ran off and fell over the bluff of the river, killing themselves and destroying the wagon and harness; that from the location of the road, the intervention of the bluff and the noise made by the wagon, it was difficult to hear either bell or whistle. The evidence was conflicting as to whether either the bell was rung or whistle sounded. The evidence also tended to show that the defendant had kept a watchman or flagman at the said crossing up to within about eighteen months before the injury complained of occurred, and that plaintiff knew that for that length of time there had been no watchman at the crossing. Upon this state of facts the court gave, over defendant's objection, the following instruction :

If the jury find from the evidence that the public highway running north from the city of Palmyra, from a point some two or three hundred yards before it reaches the point where it is crossed by the railroad, to within a few feet of the south end of the bridge across North river, is constructed by cutting into the side of the bluff, leaving the bed of the highway uneven and rocky, and if the jury further find that persons travelling on said highway, going north toward said crossing and bridge, in wagons or other vehicles, by reason of the noise made by such vehicle, and an intervention of the bluff between the point on said highway at which said vehicle was descending said bluff, and the train approaching said crossing from the east, could not ordinarily hear the whistle or bell and could not see said train, and if the jury find that by reason of the above facts said crossing was unusually dangerous to the safety of travellers and their teams approaching said crossing from the direction of Palmyra, it was the duty of defendant to station at said crossing some watchman or other agent to warn such travellers so approaching said crossing of the approach of trains coming from the east, or to adopt some other means by which the crossing of their road at said point by such travellers would be rendered reasonably safe; and if the jury further find that defendant, its employees and agents, neglected to station a watchman or other agent at said point to warn travellers, and neglected to adopt any means to ren-

Welsch v. Hannibal and St. Joseph Railroad Company.

der this crossing of their road at said point by such travellers reasonably safe, and if the jury further find that the injury to plaintiff's wagon and horses was caused by such negligence of defendant or its employees or agents, the verdict should be for plaintiff.

This instruction in effect tells the jury, as a matter of law, that it was the duty of the defendant to station a watchman at the crossing if they believed that such crossing was unusually dangerous to the safety of travellers, and that its failure to do so rendered it liable for injuries occasioned thereby. Section 806, Revised Statutes, enjoins it as a duty on every railroad either to ring a bell or sound a whistle at least eighty rods from the place where such railroad shall cross any travelled public road. The above instruction adds another and additional duty to those imposed by the statute, and that this cannot be done has been expressly held in New York, where there is a statute of which the above section is a literal copy and from which it was borrowed.

In the case of *Beisigle v. New York Central R. R. Co.*, 40 N. Y. 9, it is said : " The question is fairly presented whether a railroad company is required by law to station a flagman at every street or road crossing, where in the opinion of a jury the travel is such that ordinary prudence requires it, for the purpose of warning and keeping travellers off from such crossing when trains are passing over it." In the disposition of this question it was observed that " railroads are authorized by statute to construct their roads and run their trains across streets and highways. The same statute provides that they shall give certain signals for the purpose of warning travellers of their approach and presence ; such signals being in the judgment of the legislature sufficient to protect the public from injury in the use of crossings. Keeping a flagman at the crossing or any of them, is not required by statute ; nor does the statute require the company to give warning to travellers other than is therein required. The question remains whether the common law requires the company to warn travellers of approaching trains by other and more effective means than the statute requires. The claim that it does, is based upon the maxim that every one must so use his own as not to injure another. In applying the maxim it must be borne in mind that the traveller and the railroad have each an equal right of way in the crossings, derived from the same authority ; the former for the purpose of travel, and the latter for running its trains. A collision is some-

Welsch v. Hannibal and St. Joseph Railroad Company.

what dangerous to the trains, but vastly more so to the traveller. The law imposes upon both the duty of observing care to avoid them. But the care imposed upon the company is in operating its trains, in so transacting its business in the exercise of its right of way, as not to injure others in the exercise of their similar right, provided the latter exercise due care on their part. This relates to the mode of operating the trains and all other things done by the company in the transaction of its business. It does not require the company to employ men to keep travellers off the track, or to serve notices upon them that trains are approaching. Should the company do this it would relieve the traveller from all necessity of exercising care in this respect, and it would, indeed, be safe for him to go upon the track, having received no express warning. If the exertions of the flagman were in any particular case inadequate to prevent injury to a traveller, upon the same principle it might be submitted to a jury whether ordinary prudence did not require gates to be closed at certain crossings, while trains were passing, or something else done to protect the traveller, and if in their judgment it did, to instruct them that such omission was negligence."

So in the case of *Weber v. New York Central R. R. Co.*, 58 N. Y. 459, where the same question was considered, it was held that "the duty of posting flagmen or having servants and agents, or placing gates or other obstructions, or of giving special or personal notice to travellers at railway crossings, can only be imposed by the legislature."

If there had been evidence in this case tending to show that at such a crossing as the one where the injury occurred, the employment of a flagman was one of the common and usual means of warning adopted by prudent railroad companies, then the omission to have employed one might have been negligence, and had that question, with evidence upon which to base it, been submitted to the jury, as it was in the case of *Kinney v. Crocker*, 18 Wis. 74, under the authority of that case it might have been justified. Judgment reversed and cause remanded.

Judgment reversed.

All concur.

NOTE BY THE REPORTER. — A railroad company is bound to give signals of warning to travellers on public highways at crossings, although none are required by statute. *Louisville, etc., R. Co. v. Commonwealth*, 18 Bush, 388; s. c., 26 Am. Rep. 205, and note, 207.

In *Weber v. N. Y. Cent., etc., R. Co.*, 58 N. Y. 451, ALLEN, J., said: "It is not enough, in all cases, to absolve a railroad corporation from the charge of negligence, that the statu-

Welsch v. Hannibal and St. Joseph Railroad Company.

tory signals are given. The circumstances may be such as to require other precautions in the running of a train, or in the use and occupation of the tracks. There may be negligence which will charge the company other than the bare omission to sound the whistle or ring the bell. *Beisiegel* case, *supra*; *Eaton v. Erie R. Co.*, 51 N. Y. 544; *Caldwell v. N. J. Stbt. Co.*, 47 Id. 282; *MacKay v. N. Y. C. R. R. Co.*, 85 N. Y. 75. But as a general rule—and if there are exceptions to it they can exist only under very peculiar circumstances and in extreme cases, and none occur to me now—a railroad corporation is only called upon, in adopting precautionary measures to prevent collision with and injury to those who in common with it have occasion to use public highways, to have respect to the moving of its trains and the use of its road. A railroad company must so operate its trains and use and occupy its railway, in the enjoyment of the right of way which it has in common with the ordinary traveller, as not to injure others in the exercise of their right of way, provided the latter are guilty of no want of care on their part. But the rule which imposes the obligation of care and prudence upon a railroad corporation, and measures its liability to others liable to receive injury from moving cars or locomotives, does not call for any act outside of or disconnected with its actual operations, and the use of the railway. The duty of posting flagmen, or having servants and agents, or placing gates or other obstructions, or of giving special or personal notice to travellers at railway crossings, can only be imposed by the legislature. Courts and juries cannot, whatever may be thought by them of the convenience or necessity of such or other like precautions, at particular crossings, hold the company to provide them under the penalty of being charged with negligence for the omission. Juries may, and must say, whether a railroad company sought to be charged for alleged negligence, has, in the operation of its trains, the use of its road tracks and the conduct of its business, used that degree of care and prudence which the circumstances and its obligation to others required, but beyond this they cannot go. Negligence cannot be predicated of omissions to do something outside of and beyond this."

In *Culhane v. N. Y. Cen. & H. R. R. Co.*, 60 N. Y. 128, the same judge said: "Upon the trial evidence was given that there was no flagman or other person at the place designated, whose duty it was to warn people of the approach of trains; and in submitting the case to the jury the judge when calling their attention particularly to the evidence bearing upon the question of contributory negligence on the part of the plaintiff's servant in charge of and driving his horse and vehicle at the time of the injury, put to them in terms, among other questions, this interrogatory: 'Is it true that he looked in both directions, and there being no flagman, and he hearing nothing?' The allegations of the complaint, the evidence given and the form of the interrogatory to the jury, made pertinent the request to the judge, by the counsel for the defendant at the close of the charge, to instruct the jury that the defendant was not required to give any actual notice whatever to this plaintiff or his servant, of the approach of the engine, beyond the ringing of the bell. It was not under the circumstances of this case and the course of the trial, and the instructions given to the jury, irrelevant to the issue actually tried, or a mere abstract proposition not affecting the result of the action upon trial. The jury might very readily infer that the omission of the defendant to post and keep a flagman at the intersection of Hudson street and the railroad was culpable negligence on its part, or that it relieved the plaintiff's servant from that care and caution in approaching the railroad track which he would otherwise be bound to observe. The remark of the judge was very liable, unexplained, to mislead the jury and give them the impression that there was an immediate connection between the omission referred to and the injury to the plaintiff's property, and the liability of the defendant therefor. A railroad corporation is not called upon to keep a flagman, and is only bound to operate its trains with the care and caution called for by the peculiar circumstance."

A traveller invited by the flagman to cross, and injured, may recover. *Sweeney v. Old Colony and Newport R. Co.*, 10 Allen, 808; *Lunt v. London, etc., R. Co.*, L. R., 1 Q. B. 277.

The omission to station a flagman may be taken into account as evidence of negligence. *N. J., etc., Transp. Co. v. West*, 32 N. J. 91; *Penn. R. Co. v. Matthews*, 33 Id. 531; *Bilbe v. London, etc., R. Co.*, 1 C. B. (N. S.) 584, 592; *Cliff v. Midland R. Co.*, L. R., 5 Q. B. 61; *Kansas, Pacific R. Co. v. Richardson*, 25 Kans. 391; *Kinney v. Crocker*, 18 Wls. 74. In *Penn. R. Co. v. Matthews*, *supra*, the trial court instructed the jury as follows: "The

Welsch v. Hannibal and St. Joseph Railroad Company.

defendants owed a duty to the travelling public, which may be summed up in this one sentence. They were bound to use all such precautions as are reasonably necessary to give to persons crossing their track on the highway, warning of the approach of their trains, in order to enable persons crossing over the track by the highway, to avoid collision. In that proposition is embraced all the law of the case. That the company were bound to give reasonable warning, either by signals or by a flagman, to persons travelling the highway, to enable them to avoid collision by the company's trains. There is no general rule of law by which a railroad company is bound to place a flagman at a particular crossing, and it is only where, by the configuration of the country, that is, the situation of the adjoining land with respect to the railroad, or where the travel is so constant and frequent over their railroad, that the use of ordinary signals would fail to give reasonable notice to the public having occasion to cross the track, that the company is bound to place a flagman at the crossing." On review in the Court of Errors and Appeals, BEASLEY, C. J., said: "And this proposition seems to me to be, in its application to the case then trying, in all respects correct. It is, in fact, nothing more than saying that a railroad company cannot, by the mode in which they choose to construct their road and its appendant buildings, render a public road impassable. I quite agree to the remark made by one of the English judges, that the question whether flagmen are to be required to be kept at every cross-road, is not to be left to the caprice of juries. The statute which confers upon a railroad the right to make a track and work it, by necessary implication subjects the public to the ordinary risks attendant on the exercise of the privileges thus granted. Under usual circumstances, in the open country, they can run as many trains, and at as great a rate of speed, as are consistent with the safety of their passengers. They are not called on to keep flagmen, under ordinary circumstances, at cross-roads, nor to give any other notice of the approach of their trains than those signals that are prescribed by statute. If greater safeguards are requisite for the safety of the community, and those public agents are to be put under greater restrictions in the exercise of their franchises, such contrivances must proceed from the legislative, and not from the judicial power.

"But while I thus say that these additional burdens cannot be imposed by the courts upon these companies, I also say, at the same time, and with quite as much emphasis, that the companies may, by their own conduct, impose such burdens on themselves. If one of them chooses to build its track in such a mode as to unnecessarily make the use of a public road which it crosses greatly dangerous, I think such company, by its own action, must be held to have assumed the obligation of compensating the public for the increased danger, by the use of additional safeguards. The reasonable and indispensable implication is, that the railway is to be constructed so as not unnecessarily to interfere with the safe use of the public roads; and if a railroad, for its own convenience, curves its track as it leaves a deep cut, within a few feet of a highway, and also sees fit to put up buildings close along such track, and by these means, or either of them, heightening the danger in the use of such highway, it seems to me very clear, that such company must be held to have taken upon itself the duty of averting such danger, by the employment of every reasonable precaution within its power. On such occasions as this, or whenever the situation is embraced within the principle stated, the presence of a flagman, or some equivalent safeguard can be demanded of the company. The rule is, as I understand it, that when the company has created extra danger, it is bound to use extra precautions. If the track is put in a position where the trains, when close to their transit over a public street or road, cannot be seen, this is an extra danger which calls for more than the ordinary cautionary signals. I can see no difficulty in applying this rule; it will obviously be very much under the control of the court.

"The principle thus expressed is the one which, I think, now prevails in the English courts. It was enforced, though without any reference to the theoretical grounds on which the judgment was rendered, in the case of *Bilbee v. London & Brighton R. R. Co.*, 13 C. B., (N. S.) 584. But this decision was considered, and the principle involved in it admirably explained in the recent and important case of *Cliff v. Midland Railway Co.* L. R., 5 Q. B. 258. In this latter authority all general liability in railway companies to provide gate-keepers or flagmen is entirely repudiated; but at the same time, their responsibility for not providing against unusual risks of their own creation, is just as decidedly maintained.

Austin v. Huntsville Coal and Mining Company.

"With respect to the case of *Beisiegel v. New York Central*, 40 N. Y. 9, which was much relied on, upon the argument, by the counsel of the defendant, I have to remark, that on a careful examination I do not find that it is at all hostile to the doctrine already declared by me. The decision in that case is to the effect that it cannot be left to a jury to find, from the mere fact that a street is in a populous town and is much used, whether it is incumbent on a railway company, whose track intersects such street, to station a flagman at such point. This would clearly be to leave the whole matter to a jury, without anything to control or guide their judgments. Such a course of proceedings would not be justified by the rule, as above defined by me. The charge of the judge in the present case had no such scope as this; the situation of danger, which it was alleged was extraordinary, had admittedly been occasioned by the defendant, and it was in view of such a state of things that the instruction was given to the jury that under such circumstances that they thought a reasonable protection had not been afforded to 'the travelling public' by the usual signals, the company were responsible for the failure to use other precautions. In the reported case the danger to be provided against was the ordinary danger consequent on the use of the road under ordinary circumstances; in the case at the Circuit the use had been under extraordinary circumstances, hence the difference of the rule applicable to each of the cases."

But the permanent withdrawal or temporary absence of a customary flagman does not excuse the relaxation of care on the part of the traveller. *McGrath v. N. Y. Central, etc., R. Co.*, 59 N. Y. 468; s. c., 17 Am. Rep. 359, and note, 363. And the absence is immaterial if the traveller did not know of the custom to station one at the point in question. *Pakalinsky v. N. Y. Central, etc., R. Co.*, 88 N. Y. 424. See *Baughman v. Shenango, etc., R. Co.*, *post*.

But if a flagman is employed, and is present at the time and place in question, to the knowledge of the traveller, and neglects to warn the traveller of the approach of the train, this is negligence. *Kissenger v. N. Y., etc., R. Co.*, 56 N. Y. 543. CHURCH, C. J., said: "Although it is not negligent for a railroad company to omit to keep a flagman, yet if one is employed at a particular crossing, his neglect to perform the usual and ordinary functions of the place may be sufficient to charge the company. The request therefore that the jury must find both a neglect of the flagman and an omission to ring the bell, was not tenable. If the plaintiff did not hear the bell and there was a neglect to give any warning by the flagman, and such neglect solely produced the injury, it was sufficient."

AUSTIN V. HUNTSVILLE COAL AND MINING COMPANY.

(72 Mo. 535.)

Damages — measure of — property taken by mistake

In trespass for taking coal by mining, the act not being willfull or negligent, the measure of damages is the value at the mouth of the shaft, less the cost of severing and raising.

THE opinion, on this point, is sufficiently reported in note, 36 Am. Rep. 770.

Jordan v. Hovey.

JORDAN V. HOVEY.

(72 Mo. 574.)

Master and servant — parent and child — master persuading servant to sexual intercourse with his minor child.

An employer persuaded his female servant to consent to sexual intercourse with his minor son, to whom she was affianced. The son subsequently refused to marry her. *Held*, no ground of action of damages against the employer and father. (*See note, p. 448.*)

ACTION of damages for persuading to consent to sexual intercourse. The opinion states the case. The plaintiff had judgment below.

Smith & Krauthoff and Benj. V. Alton, for appellant.

HOUGH, J. The petition in this case states, in substance, that on the 15th day of July, 1875, and for six months prior thereto, the plaintiff was a servant in the hotel of the defendant; that soon after she became defendant's servant, she and Charles Hovey, a minor son of the defendant, mutually promised each other marriage; that during the existence of said contract of marriage, the defendant unlawfully, wrongfully and negligently advised and encouraged the plaintiff to have sexual intercourse with said Charles Hovey, assuring her that it would be neither criminal nor improper; that relying upon the advice of her master, the defendant, and upon the promise of marriage made to her by said Charles Hovey, she permitted Charles Hovey to have sexual intercourse with her twice, on or near the 4th day of July, 1875, and that on or about the 15th day of July, 1875, Charles Hovey violated and repudiated his promise of marriage, and refused to marry plaintiff. The petition concludes as follows: "That on account of the advice and negligent conduct of the said Eleazer Hovey, and the violation of the marriage contract by said Charles Hovey, this plaintiff was thrown out of employment for six months or more, and otherwise damaged in the sum of \$5,000, for which she prays judgment with costs of suit." The plaintiff recovered judgment in the court below, and the defendant has appealed; and we are required to determine whether the facts stated constitute a cause of action against the defendant.

Jordan v. Hovey..

It is settled that a woman cannot maintain an action for damages against her seducer. *Roper v. Clay*, 18 Mo. 384; *Paul v. Frazier*, 3 Mass. 71; 3 Am. Dec. 395; Dicey on Parties, p. 349; Hill. on Torts, 512. Such is the rule at common law, and in the absence of any legislative enactment giving a right of action, the common law is declared by statute to be the rule of decision in this State. R. S., 3117. As the plaintiff could not maintain an action for her seduction against Charles Hovey, she cannot maintain an action against one who by immoral and impure advice aided and assisted in her seduction. The plaintiff however could have maintained an action against Charles Hovey for breach of promise for marriage, provided he did not interpose a plea of infancy, and her seduction might have been given in evidence in aggravation of damages. *Roper v. Clay*, 18 Mo. 383; *Wilbur v. Johnson*, 58 id. 600. But no reason whatever is alleged in holding the defendant responsible for the breach of promise of his son. It is not distinctly alleged that he knew of his son's promise of marriage, and it does not even inferentially appear that he ever consented that his son should enter into the contract, or that he instigated him to a breach of it. The absence of these circumstances is not mentioned because their presence would make the father liable, but to show how utterly groundless is the claim of the plaintiff against the defendant from that point of view.

Nor do we perceive how any right of action can accrue to the plaintiff by reason of the fact that the relation of master and servant existed between defendant and herself, at the time of his alleged misconduct. She was under no lawful constraint, as servant, either to hear or heed his corrupt counsel, and while, in a moral point of view, the existence of that relation undoubtedly adds to the turpitude of his conduct, yet neither the common law nor any statute of this State will warrant us in holding that such conduct on the part of master constitutes a violation of his legal obligations to the servant. We are all of opinion that the petition fails to state a cause of action against the defendant, and the judgment will be reversed.

Judgment reversed.

NOTE BY THE REPORTER.—In *Paul v. Frazier*, *supra*, PARSONS, C. J., said: "The declaration amounts to a charge against the defendant for deceiving the plaintiff and persuading her to commit a crime, in consequence of which she has suffered damage. She is a rater of the crime, and cannot come into court to obtain satisfaction for a supposed injury to which she was consenting." On the other point the doctrine of the principal case is supported by *Sherman v. Rawson*, 102 Mass. 400; *Kelly v. Riley*, 106 id. 339; s. c., 2 Am.

Savings Bank of Hannibal v. Hunt.

Rep. 336; *Burks v. Shain*, 8 Bibb, 341; *Whalen v. Layman*, 2 Blackf. 194; *Wells v. Padgett*, 8 Barb. 323; *Sauer v. Schulenberg*, 83 Md. 288; s. c., 8 Am. Rep. 174, but denied in *Weaver v. Bachert*, 2 Barr. 82.

SAVINGS BANK OF HANNIBAL V. HUNT.

(72 Mo. 597.)

Surety — for officer — re-election of principal.

A cashier of a savings bank gave bond with sureties of faithful performance. The bond was required by the by-laws. It was silent as to the term. A statute prescribed the term as one year and until the election of his successor. He was twice annually re-elected, but gave no new bond. In the third year he defaulted. *Held*, that his sureties were not liable.*

ACTION on a bond. The opinion states the case. The defendants had judgment below.

James Carr and *J. L. Robards* for plaintiffs in error. The bond was intended to secure the plaintiff in the faithful performance of the duties of the office of cashier so long as Hunt should hold that office. *Sparks v. Farmers' Bank*, 9 Am. L. Reg. (N. S.) 365; *Treasurers v. Lang*, 2 Bail. 430; *Daly v. Commonwealth*, 75 Penn. St. 331; *Oswald v. Mayor of Berwick*, 5 H. L. Cas. 856; *Butler v. State*, 20 Ind. 169; *State v. Berg*, 50 id. 496; *Akers v. State*, 8 id. 484; *Spencer v. Champion*, 9 Conn. 536; *Thompson v. State*, 37 Miss. 518; *Middlesex Man. Co. v. Lawrence*, 1 Allen, 339; *Dedham Bank v. Chickering*, 3 Pick. 335; *Mayor, etc., of Berwick v. Oswald*, 3 El. & Bl. 653; *Amherst Bank v. Root*, 2 Met. 522; *Placer Co. v. Dickerson*, 45 Cal. 12; *Chairman of Com. Schools v. Daniel*, 6 Jones, 144; *Supervisors v. Kaime*, 39 Wis. 474.

Harrison & Foreman, for defendant in error. The sureties on the bond were only bound by its terms for the year 1871, for which said Hunt was elected, and for a reasonable length of time after his re-election in 1872 to enable him to give a new bond. *Harris v. Babbitt*, 4 Dill. 185; *Moss v. State*, 10 Mo. 383; *Bigelow v. Bridge*, 8 Mass. 275; *Chelmsford Co. v. Demarest*, 7 Gray 1; *Inhabitants of Rochester v. Randall*, 105 Mass. 295; s. c., 7 Am. Rep. 519.

* See *Citizens' Loan Ass'n of Newark v. Nugent* (11 Vroom, 215), 29 Am. Rep. 230.

Savings Bank of Hannibal v. Hunt.

and note; *Mayor, etc., of Rahway v. Crowell*, 40 N. J. L. 207; s. c., 29 Am. Rep. 224; *Citizens Loan Association v. Nugent*, 40 N. J. L. 215; s. c., 29 Am. Rep. 230; *Dover v. Twombly*, 42 N. H. 59; *Welch v. Seymour*, 28 Conn. 387; *Mutual Loan & Bldg. Asso. v. Price*, 16 Fla. 204; s. c., 26 Am. Rep. 703.

HENRY, J. This is a suit on a bond executed by William A. Hunt, as principal and C. O. Godfrey and Josiah Hunt, as his securities. In January, 1871, William A. Hunt was appointed by plaintiff's board of directors cashier of the bank, for the term of one year, and until his successor should be duly elected and qualified. The bond was required, not by the act under which the company was incorporated, but by a by-law of the company. The penalty of the bond was \$20,000, and the condition was for the faithful discharge of his duties by Hunt, as cashier.

The bond was silent as to the term of office, and as to the period of time for which the obligors were to be liable thereon. Hunt was a defaulter, and his defalcations occurred between January, 1872, and the 6th day of January, 1874, after the expiration of one year from the date of his first appointment. The answer of the administrator was a general denial, and Godfrey pleaded his discharge in bankruptcy. A jury was waived, and on a trial by the court, there was a verdict and judgment for defendants, from which plaintiff has appealed.

Except with respect to the appointment of a successor to Wm. A. Hunt, as cashier, after one year from the 3d day of April, 1871, the allegations of the petition were proved as alleged, and on that point the evidence was to the effect, that in January, 1872, said Hunt was re-appointed cashier, and again in January, 1873, but never gave any bond as such, except the one in suit, and continued to act as such from the date of his first appointment, until the 6th day of January, 1874. The instructions were numerous, but without inserting them, it may be stated briefly, that on the facts the court held that the securities were not liable, and that is the only question to be considered. Section 3 of the article in relation to savings banks, Wagner's Statutes, 330, under which the plaintiff was incorporated, provides that: "The affairs and business of any such association shall be managed and controlled by a board of directors, not less than five nor more than thirteen in number, from whom there shall be designated by themselves a president, cashier

Savings Bank of Hannibal v. Hunt.

and secretary, who shall hold their office for one year, and until their successors are duly elected and qualified." No qualifications of cashier, except membership in the board are prescribed in that chapter, but they are to be found in the by-laws of the company.

By the 6th clause of section 1, Wagner's Statutes, 289, every corporation has power to make by-laws, not inconsistent with existing law, for the management of its property, the regulating of its affairs and the transfer of its stock. The 4th by-law of the plaintiff was as follows: "The cashier shall be responsible for all the money, funds and valuables of the bank, and shall be custodian thereof, and shall give bond with security, in the sum of \$20,000, to be approved by the board, conditioned for the faithful discharge of the duties of his office," etc. This by-law is reasonable, and within the scope of the power conferred by section 1, *supra*.

The doctrine now well settled in this State is, that an officer elected or appointed to hold for a definite period of time and until his successor shall be duly elected and qualified, holds his office for the specified term, and if no successor be elected or appointed at the expiration of the time, his term of office continues until such appointment or election, and that the time during which he holds, after that specified time has expired and until a successor is elected and qualified, is as much a part of his term of office as the preceding time. *State v. Lusk*, 18 Mo. 333; *State v. Auditor*, 38 id. 193. The bond being silent on the subject, reference must be had to the law under which Hunt was appointed, to ascertain the liability of the sureties with respect to the time it should continue. They are presumed to have known that the tenure of his office, by the general law, not the by-law, was one year, and as much longer as the company should fail to appoint a successor. Their obligation is for his discharge of the duties of cashier for one year, if at the expiration of that time a successor should be appointed, and for one year and such additional time as should elapse thereafter before a successor was appointed. The same policy which in case of public officers continues the incumbent in office until a successor is appointed, keeps alive the bond for the same period. Hence, if there had been no election of a successor to Hunt, in this case, the liability of the sureties would be unquestionable under our decisions.

In some of the States the contrary is held. Many of the cases are cited by Judge DILLON in his opinion in *Harris v. Babbitt*, 4

Savings Bank of Hannibal v. Hunt.

Dill. 191 ; among them *Moss v. State*, 10 Mo. 333, also cited as sustaining that view in *Dover v. Twombly*, 42 N. H. 68, but with due deference to the learned judge and the Supreme Court of New Hampshire, the *State v. Moss* is not an authority for the doctrine it is cited to support. The act under which the bond sued on there was given made the sheriff *ex-officio* collector for two years, but he was required to give bond, as collector, annually, and his office declared vacant if he failed to give it. R. S. 1835, p. 536, §§ 1, 2, 3. But whether the one or the other doctrine be correct, in regard to public officers, this case, as was held by DILLON, J., in *Harris v. Babbitt*, is distinguishable from those involving the liability of securities for public officers. The office of cashier of a bank is a private office, not created for the good of the public or to subserve the public interests, but the private ends of the owners of its stock. The bank is a private enterprise, which is by law incorporated for the benefit of the parties interested peculiarly and as a matter of grace on the part of the State.

Did the appointment of Hunt to be his own successor, and his continuance as cashier without giving a new bond, exonerate defendants from liability on the bond in question ? We are all of opinion that it had that effect. It was the same as if another person had been appointed in his stead, and without giving the bond required, had entered upon the discharge of the duties of the office with the assent of the board. The bond was required for the benefit of the bank. The statute under which the bank was incorporated, required no bond as a qualification of its cashier. The plaintiff could require it or not, and after the by-law was adopted the bank could have dispensed with it, as well in Hunt's case as in the case of another appointed in his stead. Hunt was appointed in 1872 and again in 1873, and on both occasions plaintiff either excused him from giving the bond, or by negligence failed to take it, and cannot now turn upon these securities and hold them liable on their bond, because the plaintiff neglected to discharge its duty, or expressly excused Hunt in 1872 from executing another bond. He was in office, after his appointment in 1872, not by virtue of his appointment in 1871, but under a new appointment ; and again in 1873 he was re-appointed and no bond taken. If the bank considered him still in office under the first appointment after he was appointed in 1872, why go through the idle ceremony of again formally appointing him in 1873 without requiring a bond ? The

Savings Bank of Hannibal v. Hunt.

position of the bank now is, that admitting his appointment in 1872 and again in 1873, yet as it permitted him to continue to discharge the duties of the office without requiring a new bond, he was not in office under either of the last two appointments. If another person had been appointed in 1872, and with the assent of the plaintiff, without giving the bond, assumed to act as cashier, it would surely not be contended, either that Hunt would have had any rightful claim to the office, or that the bank could have repudiated any of the acts of such successor which its cashier was authorized to perform? If not, it must be because an appointment by the board and assumption of the duties of the office by such person, with their assent, is sufficient to invest him with the office, although he may have failed to give the required bond. The principal question involved here was before the Circuit Court of the United States for the western district of Missouri, in *Harris v. Babbitt*, and Judge DILLON held that the securities in that case, in all of its essential facts analogous to this, were not liable. 4 Dill. 186. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

All concur.

CASES
IN THE
SUPREME COURT
OF
NEVADA.

STATE V. AH SAM.

(15 Nev. 27.)

Constitutional law — statute — construction — opium act — “to resort.”

A statute “to regulate the sale or disposal of opium, and to prohibit the keeping of places of resort for smoking or otherwise using that drug,” is not unconstitutional as embracing more than one subject.*

To “resort” means to go once.

CONVICTION of illegally selling opium. The opinion states the case.

L. J. Maddux and S. Grass, for appellant.

M. A. Murphy, attorney-general, for respondent.

BEATTY, C. J. The appellant was convicted of violating section 6 of “An act amendatory and supplemental of an act to regulate the sale or disposal of opium and to prohibit the keeping of places of resort for smoking or otherwise using that drug,” etc. Stat. 1879, 121.

The following is the material portion of said section: “Section 6. It shall not be lawful for any person to resort to any house,

* See *Neuendorff v. Duryea* (69 N. Y. 557), 25 Am. Rep. 235, and note, 247.

State v. Ah Sam.

room, or apartment, or other place kept for any of the purposes forbidden by this act, for the purpose of indulging in the use of opium or any preparation containing opium, by smoking or otherwise."

We are asked to reverse the judgment of the District Court, on the ground that it was error to overrule the defendant's demurrer to the indictment, whereby it was objected: 1. That the whole of said act is unconstitutional and void, for the reason that it embraces more than one subject; and, 2. That even if the whole act is not void, for the reason stated, section 6 thereof, at least, must fall, because its provisions are not within the terms of the title.

The clause of our Constitution upon which these objections are founded reads as follows: "Each law enacted by the legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title." Art. 4, § 17. Provisions similar to these in the Constitutions of the other States have generally been held to be mandatory (Cooley Const. Lim. 150), and such is the view of this court. *State v. Silver*, 9 Nev. 227.

The appellant is correct therefore in assuming that any act passed in disregard of the letter and spirit of these provisions is *pro tanto* void. If two incongruous subjects are embraced in the same act, the whole act is void, and even when but one subject is embraced in an act, yet if its title has been unnecessarily made so restrictive as not to cover the whole subject, such parts of the act as are not included by the title must fail.

Does the act under which the appellant was convicted embrace more than one subject, or is its title too restrictive to cover the provisions of section 6?

Clearly it does not embrace more than one subject, and if its title had been, "An act for the suppression of opium dens," we think no one would have been found to question its constitutionality. The following is an epitome of its different provisions: It prohibits the sale of opium, except when prescribed by licensed physicians, and in that case allows only druggists and apothecaries to sell it; prohibits the keeping of places of resort for smoking; prohibits the leasing of houses for such purposes; subjects the interest of the owner or lessor of premises leased with knowledge that they are intended to be used for opium smoking, to a lien for any fine or costs recovered against the occupant, and finally, by section 6, prohibits

all persons from resorting to places kept for the forbidden purpose.

From this statement it is apparent that the legislature, in passing the act in question, had but one object in view, viz.: the suppression of the places commonly known as opium dens, and nothing is contained in the law that is not clearly conducive to that end. The sale of opium is restricted, as far as it can be consistent with its proper use as a remedial agent, in order to prevent its improper use as a means of intoxication, and such restriction of its sale has an obvious tendency to break up the establishments at which the law is aimed. Of the same tendency are the provisions of section 6, the effect of which is to drive away the patrons and diminish the profits of such establishments. The other provisions of the act are even more directly adapted to the end in view. There is nothing therefore in the body of the law to sustain the first objection above stated. The second objection, however, which relates to the title of the act, has a much greater show of reason to support it.

This does not profess in explicit terms to aim at the suppression of opium dens by every legitimate means, but merely to prohibit the keeping of such places, and upon strict rules of interpretation, it would be difficult to maintain that the latter expression is as broad as the former, or that it will cover any thing besides provisions for punishing the keepers of the interdicted resorts. But in dealing with this particular objection to parts of statutes, which as a whole embrace but one subject of legislation, the courts of the different States have adopted an exceedingly liberal rule of construction in favor of their validity. The decisions on the point are very numerous, but it would be unnecessary and unprofitable to attempt a review of them; for in scarcely a single instance is an attempt made to lay down any rule or principle more definite than is to be gathered from the remark of Judge COOLEY (Const. Lim. 146), that "there has been a general disposition to construe the constitutional provision liberally, rather than to embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purposes for which it has been adopted."

The "beneficial purposes" designed to be accomplished by the provision in question are said to have been the prevention of "surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore

be overlooked, and carelessly and unintentionally adopted," and to fairly appraise the public of the subjects of legislation under consideration by their representatives, in order that they might have an opportunity of being heard thereon by petition, or otherwise. Cooley Const. Lim. 142, 143. It is not inconsistent with these purposes to give some slight enlargement to the literal meaning of the title of a law, and there are numerous precedents that will justify us in saying that the title of this act, "to prohibit the keeping of places of resort," etc., is substantially equivalent to "for the suppression of places of resort," etc. Cooley Const. Lim. 141-150, and notes.

We conclude that the objections to the constitutionality of the law, under which the appellant was indicted, are unfounded, and that the District Court did not err in overruling his demurrer.

The appellant also contends that the District judge erred in instructing the jury to the effect, that going once to a place kept for opium-smoking, for the purpose of smoking, is an infraction of the law. What the statute forbids all persons to do is to "resort" to such places, and it is argued that resort means, not to go merely once, but to go and go again—in other words, to make a practice of going. The etymology of the word resort lends some support to this argument, but the definitions given in the lexicons show that whatever may have been its original meaning, it no longer means any thing more in the connection in which it is employed in the statute than to go once.

It is also claimed that the evidence was insufficient to show that the place where appellant was arrested was a place of resort such as the statute prohibits. But upon this point we think the case was very clearly made out. The evidence showed that the room in which the appellant was arrested contained all the apparatus for opium-smoking, and a number of persons—white men and Chinamen—besides the appellant, were found there in various stages of the sort of intoxication produced by the use of opium.

The judgment appealed from is affirmed.

Judgment affirmed.

STATE V. FOLEY.

(15 Nev. 64.)

Criminal law — pardon after punishment — disqualification of witness by foreign conviction.

A pardon may be granted after the offense is fully expiated.
One convicted in another State of an infamous offense is thereby disqualified from testifying in Nevada.*

THE opinion states the points.

R. H. Taylor, for appellants.

M. A. Murphy, attorney-general, for respondent.

BEATTY, C. J. At the trial of this case in the District Court, the State called, among other witnesses, one Charles F. Roper. The defendants objected to the competency of this witness on the ground that he was a convicted felon, and to support their objection offered, together with his own admissions, duly authenticated records of the courts of California, from which it appeared that he had been convicted in that State of two distinct offenses—grand larceny in Butte county, 1873, and burglary in the second degree in Alameda county, in 1877, and thereupon sentenced to imprisonment in the State prison. No objection was made to this evidence; and it seems to have been conceded at the trial, as it has been in the argument here, that it was sufficient to disqualify the witness unless his competency was restored by a pardon, of which the following is a copy:

“STATE OF CALIFORNIA, EXECUTIVE DEPARTMENT.

“Whereas, at the April term, A. D. 1877, of the County Court, held in and for the county of Alameda, in said State, Charles Anderson” (which Roper admitted to have been his then *alias*) “was tried and convicted of the crime of burglary, second degree, and sentenced to undergo an imprisonment in the State prison for the term of two years;

* *Contra. Nat. Trust Co. v. Gleason* (77 N. Y. 400), 33 Am. Rep. 682, and note, 683.

State v. Foley.

“ And, whereas, the said Charles Anderson was discharged from the prison on the fifth day of January, A. D. 1879, without being pardoned ;

“ And whereas, the testimony of the said Charles Anderson is represented to be necessary to the ends of justice in cases now pending in the courts of justice of the State of Nevada ;

“ And whereas, an unpardoned felon is not permitted by the laws of said State to testify in the courts of justice thereof ;

“ NOW, THEREFORE, by virtue of the authority in me vested by the Constitution and laws of this State, I, William Irwin, Governor of the State of California, do hereby pardon the said Charles Anderson, and order that he be restored to citizenship. Witness my hand and the great seal, etc.”

To the admission of this paper counsel for defendants objected upon various grounds to be more particularly noticed hereafter. But the court overruled the objections ; and being of the opinion, as we infer, that the pardon was sufficient to restore the competency of the witness, permitted him to testify to material facts against the defendants, who were thereupon convicted of the crime of burglary, and sentenced to the State prison.

Having appealed from the judgment, they assign as error, the ruling of the District judge in favor of the competency of the witness Roper.

Assuming for the present, as has been done throughout the argument, that a person convicted of an infamous offense in the courts of another State is thereby rendered incompetent to testify as a witness in a criminal proceeding in this State, we are satisfied that the District judge erred, not in overruling the objections to the admission in evidence of the pardon above granted, but in holding that its effect was to remove the consequence, not only of the conviction and judgment which it recites, but also the effects of another and distinct conviction and sentence to which it makes no sort of reference.

The specific objections to the admission of the pardon in evidence were, in substance:

1. That a pardon has no effect beyond relieving its object from the punishment expressly imposed by the sentence of the court, and consequently that it does not restore his competency as a witness.

2. That said supposed pardon was void, because it did not appear

from any of its recitals that the notice of intention to apply for it, required by the laws of California, had been given.

3. That it was void because it appeared to have been granted after the expiration of the convict's term of imprisonment.

These objections were properly overruled.

As to the first, the authorities are uniform to the effect that a full and unconditional pardon of an offense removes all disabilities resulting from conviction thereof. The cases cited by appellants in support of this objection, so far as they are in point, are against them.

In *State v. Richardson*, 18 Ala. 109, it was held that a person condemned to fine and imprisonment, and released by the pardoning power from the imprisonment, is not thereby discharged of the fine. In other words, it was held in that case, that by the express terms of the pardon in question it was the intention of the executive to remit a part only of the penalties that had been imposed.

In *Perkins v. Stevens*, 24 Pick. 277, the same thing was decided. The court say, p. 278: "The conviction of the witness rendered him incompetent. A general pardon would unquestionably restore his competency." But they show that the pardon relied on was not, and was not intended to be, a general pardon. The form adopted by the executive of Massachusetts in pardoning an offense was: "We grant unto him, the said A. B., a full pardon of his said offense, and restore him to the rights and privileges which he forfeited by the conviction aforesaid," but in the case then before the court the executive had merely, during the execution of the sentence upon the witness, remitted to him "the residue of the punishment he was sentenced to endure." The question in that case indeed was not the intention of the executive, but rather as to his authority to limit the effect of the pardon, and this was the point principally discussed, the conclusion of the court being, that the power to pardon "necessarily includes the lesser power of remission and commutation. If the whole offense may be pardoned, *a fortiori*, a part of the punishment may be remitted, or the sentence commuted. If an absolute pardon may be granted, of course a conditional one may be."

In *People v. Bowen*, 43 Cal. 439; s. c., 13 Am. Rep. 148, and *Blanc v. Rogers*, 49 Cal. 15, a similar question was involved and similar views were expressed. In the first case (p. 442) the court say: "The governor might have pardoned Davis had he seen fit—

he was not the less the subject of the executive power in that respect because he had already suffered the punishment adjudged for his crime. *U. S. v. Jones*, 2 Wheeler C. C. 451. Had he done so there is no doubt that his competency as a witness would have been thereby restored." But they held that he had not done so — that he had neither pardoned nor intended to pardon the witness, but had attempted the impossible feat of restoring his competency without pardoning the offense.

From this review of the cases cited by appellants, it will be seen that they are in perfect harmony with all the authorities as to the proposition that the effect of a full pardon "is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to the offense for which he obtains his pardon, and not so much to restore his former, as to give him a new *credit and capacity*." 4 Bl. Com. 402. See, also, 1 Greenl. Ev., § 377; *People v. Pease*, 3 Johns. Cas. 333; *Wood v. Fitzgerald*, 3 Oreg. 568; *In re Deming*, 10 Johns. 232; *State v. Baptiste*, 26 La. Ann. 136; *Ex parte Hunt*, 5 Eng. (Ark.) 284; *Hester v. Commonwealth*, 85 Penn. St. 154; 2 Hawk. P. C. 547, and cases there cited; 1 Phill. Ev. 21; 1 Gilb. Ev. 259.

As to the second point. No notice of intention to apply for a pardon is required by the law of California. "When the term of imprisonment of the applicant is within ten days of its expiration" (2 Hitt. Codes, § 14423); and *a fortiori*, we should say, no notice would be required when the term of imprisonment was completed. If so, there was no necessity that the pardon should recite the fact of notice given and proved, or that it should be established by proof *aliunde*.

As to the third ground of objection: It is well settled that a pardon may be granted after the convict has suffered the entire punishment to which he has been condemned, and that the effect, in such case, is to restore his competency as a witness. See *People v. Bowen*, *supra*; 2 Wheel. Cr. Cas. 459; *State v. Blaisdel*, 33 N. H. 388; 1 Greenl. Ev., § 377.

And there is good reason why this should be so. There have undoubtedly been cases — at least it is easy to suppose a case — in which the convict has been proved innocent after the completion of the punishment prescribed by his sentence. It would be a reproach to the law to suppose that under such circumstances nothing short of an act of the legislature (if even that would be available under

our Constitution or the Constitution of California) could restore him to his unjustly forfeited privileges. And if the power to pardon after the completion of the punishment ought to exist and does exist, it is certain that there is no limit to its exercise except the discretion of the person in whom the unrestricted power is vested. The only restrictions upon the power of the governor of California to grant pardons are, that it does not extend to the crime of treason or to cases of impeachment, and that it can only be exercised after conviction, and subject to such regulations as may be prescribed by law *relative to the manner of applying for pardons*. Const., art. 5, § 13. Hence it follows that not only under the California decisions, but under all the decisions, the power to grant the pardon under consideration is unquestionable.

It was therefore properly admitted in evidence, because it supplied part of the proof necessary to restore the competency of the witness.

But it was not, by itself, sufficient for that purpose. The witness had been convicted of two distinct felonies, and as long as either judgment remained unreversed and the offense unpardoned, he was incompetent to testify.

Now this pardon, notwithstanding its manifest object was to make Roper a competent witness in the courts of this State, cannot be held to apply to any offense except the one which it recites. Under the California decisions, above referred to (*People v. Bowen*, and *Blanc v. Rogers*), the "order that he be restored to citizenship" must be disregarded. If Roper was pardoned, those words were superfluous; if he was not pardoned, they were nugatory. The effect of the pardon must therefore be determined by reference to the preceding clause — "do hereby pardon the said Charles Anderson" — considered in connection with the preamble by which it is introduced. So considered, it must be held under the settled rule of construction applying to acts of this kind, that the governor of California intended to pardon the offense recited, and no other, and that so far as the pardon may in general terms comprehend offenses not specified, it is void.

This was the common-law rule applied to pardons granted by the kings of England, whose power in this respect was certainly more ample than that of the governor of California. They could grant pardons before as well as after conviction, and before as well as after indictment. But although it was never asserted in terms that they

State v. Foley.

had no power to pardon a man of all felonies in general without describing any one particular felony, the rule of constructing pardons had the practical effect of denying the existence of any such power. For whenever it could be reasonably intended that the king, when he granted a pardon, was not fully apprised both of the heinousness of the crime, and also how far the party stood convicted thereof upon record, the pardon was held void, as being gained by imposition upon the king. "And upon this ground it hath been holden that if one be indicted by these words: 'that he had slain a man for having sued him in the king's court,' and the king make him a charter of all manner of felonies; this charter shall not be allowed because it shall be intended that the king was not acquainted with the heinousness of the crime, but deceived in his grant." 2 Hawk. Pl. Cr., ch. 37, § 8, p. 533.

On the same principle it was held that a pardon of a particular offense after attainder, or conviction by verdict, was void unless it recited the attainder or the indictment and conviction. Id. 534.

"Also it hath been questioned whether the pardon of one who is barely indicted of felony be good, if it do not mention the indictment. But this hath been adjudged to be helped by the words '*sine indicatus sine non.*'" Id. 534.

The same author (pp. 534-5) denies the efficacy in his time (1716) of a general pardon "of all felonies" as a plea in bar to an indictment found after the granting of such pardon. But however this may be, it seems to be clear from the numerous cases and precedents cited by him, that a pardon was of no avail after conviction unless it recited the indictment and conviction. And if this was the common-law rule it is still the rule, for it has not been changed by the legislature, and the reasons upon which it stands are as strong now as they ever were. There is as strong a presumption to-day as there ever was, that although the executive might think a man worthy of being restored to civil rights who had committed one offense against the law, he would not think so if he knew that he was a habitual offender. See further upon this point, 4 Bl. Com. 400; *State v. Leak*, 5 Ind. 359; 1 Chitty Cr. Law, 770; *State v. McIntire*, 1 Jones L. (N. C.) 1.

If it be claimed that the pardon of a later offense necessarily carries with it the pardon of earlier offenses of the same character, the contrary has been held in *Hawkins v. State*, 1 Port. 475, and in *State v. M'Carty*, 1 Bay, 334.

It follows that Roper was never pardoned of the offense of grand larceny for which he was sent to the California State prison from Butte county, in 1873, and if that judgment had the effect of rendering him incompetent to testify in our courts, the appellants must be granted a new trial.

But does a conviction in one State disqualify the convict from testifying in another State? It was conceded in the argument, and we have thus far assumed, that it does. The question however is vital to the case, and we should not feel justified in deciding it in the affirmative, merely because counsel has admitted that it must be so decided. Mr. Greenleaf (1 Ev., § 376) declares that the weight of modern opinion is the other way, and Mr. Bishop (1 Cr. Law, § 976) takes the same view. There is but one case however which supports this declaration (*Commonwealth v. Green*, 17 Mass. 539), while there are at least two well reasoned and more recent decisions directly to the contrary. The first of these, *State v. Chandler*, 3 Hawks, 393, was decided very shortly after the Massachusetts case, and apparently without any knowledge of the grounds of that decision; but in the other case, *Chase v. Blodgett*, 10 N. H. 22, the grounds of the decision in *Commonwealth v. Green* are thoroughly reviewed, and the argument, in our opinion, completely overthrown. There is a reference in the digest to a case in 42 N. Y. Superior Court Reports, where the point seems to have been held as it was in Massachusetts. We have been unable to procure that volume, but we presume it adds nothing to the reasoning of the court in *Commonwealth v. Green*. This case we have given a very attentive consideration without being at all convinced by it. The court adduces a number of reasons in support of its conclusions, but rests upon no one of them as a conclusive ground of decision.

The argument to which most weight seems to be attached is, that a State will not enforce the penalty of a crime committed beyond its jurisdiction, and the denial to a convict of the right to testify, they say, is a part of his punishment. This argument is very satisfactorily met and entirely refuted in both the North Carolina and New Hampshire cases above referred to. They say, in effect, that the ground upon which a convict is held incompetent to testify is, that there is no presumption that he will speak the truth; he is excluded, not for the purpose of punishing him, but for the protection of the party against whom he offers to testify; if it thereby results incidentally that he is subjected to humiliation and disgrace,

State v. Foley.

this is an inconvenience which it is entirely within the power of the State to impose, and of which he has no more right to complain, than an atheist had to complain of the discredit which the laws of many countries formerly attached to his oath. Without further comment on these cases, we content ourselves with saying, that in our opinion, the weight of authority and the soundest reasons support the doctrine that a person convicted of an infamous crime in another State is thereby rendered incompetent to testify in our courts.

It may be that the tendency of enlightened opinion and of recent legislation in other States and countries is against the rule which absolutely excludes the testimony of a convict; it may be that it is an unwise and impolitic rule, but it is unquestionably the law of this State. Not only is the common law unaltered by statute in this particular, but in civil practice it is expressly reaffirmed. Comp. L. 1441. This shows that the legislature approves the policy of the common-law rule, and we can not hold that it is less essential in criminal than in civil cases; we feel bound on the contrary, to maintain it as strictly in one class of cases as in the other.

The common-law rule in substance is, that when it has been shown by evidence which imports verity, that a man has been adjudged guilty of an infamous crime he is no longer worthy of belief, and no man's life or liberty or property is to be affected by his oath. In England, the country from which we have received the common law, it is true that a foreign conviction did not disqualify a person from testifying, but the reason of this was, that the record of his conviction was not conclusive evidence of the fact in an English court. Under the Constitution and laws of the United States, however the public acts and records of each State, when properly authenticated, are entitled to full faith and credit in the courts of every other State. The appellants therefore proved conclusively that Roper had been sentenced to the State prison of California for a crime (grand larceny) which at common law and under our statute, was, and is a felony, and the presumption is, in the absence of all proof, that grand larceny means in California what it meant at common law and what it means under our statute. If the laws of California include under the name of grand larceny offenses which, under our law, are not deemed infamous, the fact is susceptible of proof, but until such proof is offered, the presumption is to the

Ex parte White.

contrary, and Roper must be held upon the case before us to have been proved incompetent to testify.

The judgment of the District Court is therefore reversed, and the cause remanded for a new trial.

Reversed and remanded.

EX PARTE WHITE.

(15 Nev. 146.)

Sunday — criminal judgment on.

A criminal judgment of a justice of the peace rendered on Sunday is void.

HABEAS CORPUS. The opinion states the facts.

M. S. Bonnifield, for petitioners.

M. A. Murphy, for State.

HAWLEY, J. The return to the writ of habeas corpus, issued in this case, shows that petitioners were arrested and brought before a justice of the peace on the first day of February, 1880, on a charge of having committed a misdemeanor. In answer to questions asked them by the justice they stated that they did not desire counsel. They plead guilty, and waived the time prescribed by statute for passing sentence. The justice thereupon, on said first day of February, passed sentence, and rendered judgment imposing a fine and imprisonment. The first day of February was Sunday.

Was the justice authorized to try and decide the case on Sunday? We think not. Sunday is *dies non juridicus*. At common law all judicial proceedings which take place on that day are void.

Our statute has made certain exceptions to this rule ; but in our opinion, none of the exceptions applies to this case.

The third subdivision of section 50 of an act concerning courts of justice, upon which counsel for the State relies, provides that the courts of this State may be open, and that judicial business may be transacted on Sunday "for the exercise of the powers of a magis-

Ex parte White.

trate in a criminal action, or in a proceeding of a criminal nature." 1 Comp. L. 955.

This exception only applies to the exercise of the powers of a magistrate.

"A magistrate is an officer having power to issue a warrant for the arrest of a person charged with a public offense." Cr. Pr. Act, § 101 ; 1 Comp. L. 1729.

A justice of the peace acting as a magistrate, may transact judicial business on Sunday ; may issue warrants for the arrest of parties charged with crime ; may proceed with the preliminary examination, and may commit, discharge, or release upon bail, the parties under arrest.

In the present case, the justice, in receiving the plea, passing sentence and rendering judgment, acted in the exercise of his powers as a justice of the peace. In this respect he acted without any authority of law.

The judgment rendered by him is utterly null and void. *Swann v. Broome*, 3 Burr, 1595 ; *Arthur v. Mosby*, 2 Bibb, 589 ; *Pearce v. Atwood*, 13 Mass. 324 ; *Chapman v. State*, 5 Blackf. 111 ; *Hemens v. Bentley*, 32 Mich. 91 ; Freeman on Judgments, § 138.

The petitioners must be discharged.

It is so ordered.

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C A S E S

IN THE

C O U R T O F A P P E A L S

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N E W Y O R K .

CARPENTER V. CITY OF COHOES.

(81 N. Y. 21.)

Municipal corporation — negligence — State bridge.

A city is not bound to prevent access or guard the approaches to a bridge owned by the State, on lands of the State, crossing a State canal within the city boundaries, and constructed for canal purposes, but commonly used by the public as part of a public highway.

ACTION of damages for negligence. The opinion states the facts. The defendant had judgment below.

N. C. Moak, for appellant. It was defendant's duty to protect persons driving over the bridge from falling over the side by erecting suitable barriers. *Gillespie v. Newburg*, 54 N. Y. 468; *Hyatt v. Trustees*, 44 Barb. 385; affirmed, 41 N. Y. 619; *Radway v. Briggs*, 37 N. Y. 256; *Palmer v. Andover*, 2 Cush. 600; *Woodman v. Nottingham*, 49 N. H. 387; *Manderschid v. Dubuque*, 29 Iowa, 73; s. c., 4 Am. Rep. 196; *Houfe v. Town of Fulton*, 29 Wis. 296; s. c., 9 Am. Rep. 568; *Hull v. City of Kansas*, 54 Mo. 598; s. c., 14 Am. Rep. 487; *Norris v. Litchfield*, 35 N. H. 271; *Baldwin v. Turnpike Co.*,

Carpenter v. City of Cohoes.

40 Conn. 238; s. c., 16 Am. Rep. 33; *Hunt v. Town of Pownal*, 9 Vt. 411; *Williams v. Clinton*, 28 Conn. 264; *Sewall v. Cohoes*, 75 N. Y. 45, 48, 49; s. c., 31 Am. Rep. 418. Where a city uses, as part of one of its highways, a strip of land owned by the State, and allows the public to use it as such for a sufficient length of time to indicate it to the public to be such, it is liable to one injured while passing over it in consequence of its defective condition. *Sewell v. Cohoes*, 75 N. Y. 45; s. c., 31 Am. Rep. 418; 11 Hun, 626; *Houfe v. Town of Fulton*, 34 Wis. 608; s. c., 17 Am. Rep. 463; *Cogswell v. Inhabitants of Lexington*, 4 Cush. 307; *Mayor v. Sheffield*, 4 Wall. 189; *Munson v. Town of Derby*, 37 Conn. 298; s. c., 9 Am. Rep. 322; *Hayden v. Inhabitants of Attleborough*, 7 Gray, 338; *Wheeler v. Town of Westport*, 30 Wis. 392; *Joyner v. Barrington*, 118 Mass. 463; *Bagley v. Ludlow*, 41 Vt. 425, 432-433; *Leavenworth v. Laing*, 6 Kans. 274; *Codner v. Bradford*, 3 Chand. 291; *Whitford v. Southbridge*, 119 Mass. 564; *Johnson v. City of Milwaukee*, 46 Wis. 568; *Radway v. Briggs*, 37 N. Y. 256; *Manderschid v. City of Dubuque*, 29 Iowa, 73; s. c., 4 Am. Rep. 196.

Samuel Hand, for respondent.

RAPALLO, J. The findings of the referee show that the place where the plaintiff's horse and wagon were injured was the public property of the State of New York, and a part of its public works, known as the Erie canal, being one of the approaches to the bridge which spanned the canal. It appears from the evidence that this bridge was a change bridge, used for the passage of the draft horses from one side of the canal to the other. The approach in question crossed the tow-path on the easterly side of the canal, and enabled the horses to ascend from the tow-path to the bridge. On the southerly side of this approach there was a steep descent to the tow-path and adjoining lands. The bridge and its approaches were also used by the public as a highway across the canal, in continuation and as part of a road known as the Boght road. At the time of the accident the servant of the plaintiff was driving his horse and wagon on this road westerly toward the bridge, intending to pass over it, and when near the easterly end of the bridge, and on the State land, the roadway being slippery with ice and out of repair, the horse lost his footing, swerved, and with the wagon fell down the descent or declivity on the southerly side of the road or

approach in question, which was not guarded by any railing or wall. The referee found that the cause of the injury was the neglect of the State and its officers to guard the precipitous side of the road with a sufficient wall or other adequate protection, and held that the city was not liable for the injury.

The referee also found that the said Boght road at the place of the accident was a public highway within the boundaries of the city of Cohoes.

Although the State permitted the public to use the bridge and its approaches as a highway, and they were so used, we do not think, that under the circumstances of the case, the duty of guarding the side of the road on the State land with a railing or wall devolved upon the city. The State not only owned the *locus in quo*, but it was one of its own structures, erected by it, and used as a part of its public work, with which the city had no right to interfere by the erection of permanent structures thereon, such as a railing or wall. The approach in question was constructively part of the bridge (9 Hun, 63 ; and cases cited, 8 Ell. & Bl. 836), and the city might as well be required to put a railing on the bridge, if one were needed, as upon this approach. Such action by the city might have obstructed or impaired the use which the State was making of its own premises, as a passage for horses from the tow-path to the bridge, but at all events it would have been an unauthorized interference with the State property, to place such structures thereon. Whether the city might have kept the road-bed in repair, or was required to do so, it is not necessary to determine, as it is not found that the injury was caused by any defect in the road-bed but is found to have been owing to the absence of a railing or wall, and the complaint was dismissed on the ground that the omission to erect such a guard was the fault of the State and not of the city.

We do not think that the facts found show that the city was guilty of a neglect of duty in not barricading the road, so as to prevent travellers from passing over the bridge. It does not appear that the referee was requested so to hold, or that on the trial or in the complaint, a right of recovery was claimed on any such ground. The only negligence charged in the complaint is in not guarding the side of the road with rails or fenders, and allowing it to be out of repair and unsafe for travel.

[Minor point omitted.]

There is nothing in the case of *Sewall v. City of Cohoes*, 75 N. Y.

McKeage v. Hanover Fire Insurance Company.

45; s. c., 31 Am. Rep. 418, which conflicts with our view of this case. That case holds that where a municipal corporation has appropriated a piece of land within its limits as a public street and taken charge of it, graded, regulated and paved it, it cannot, in an action for damages for not keeping it in safe condition, set up as a defense, that it has not obtained title to the land, or legally laid it out as a street, even though the title to the land be in the State. No such facts exist in the present case. The bridge and its approaches were not constructed by the city, nor had it appropriated or taken charge of them, but they were constructed by the State, and continued under its control, though permitted by it to remain open for the use of the public as a highway, as well as of those operating the canal.

The judgment should be affirmed.

Judgment affirmed.

All concur.

McKEAGE V. HANOVER FIRE INSURANCE COMPANY.

(81 N. Y. 33.)

Fixtures — mirrors — gas fittings.

Gas-fittings, screwed on the gas pipes of a building, and mirrors supported by hooks driven into the walls, are not fixtures, as between mortgagor and mortgagee. (*See note, p. 472.*)

ACTION for conversion. The opinion discloses the facts. The plaintiff had judgment below.

C. E. Tracy, for appellant.

Edward T. Bartlett, for respondent.

RAPALLO, J. The mirrors and gas fixtures in controversy were placed in the house in 1870 by Mr. Curtis, who was then owner. We concur with the court below in its conclusion that they were not so attached to the building as to form part of the realty. Gas pipes, which run through the walls and under the floors of a house, are permanent parts of the building, but the fixtures attached to these pipes are not. They are not permanently annexed

McKeage v. Hanover Fire Insurance Company.

but simply screwed on projections of the pipes from the walls, left for that purpose, and can be detached by simply unscrewing them. It was shown that the fixtures in question were simply screwed on in the usual way. The mirrors were not set into the walls, but were put up after the house had been built being supported in their places by hooks or supports, some of which were fastened with screws to the wood work and others driven into the walls, and were capable of being easily detached from these supports without interfering with or injuring the walls. All these articles were, in their nature, mere furniture, and therefore chattels, and not appurtenances to the building. *Winslow v. Merchants Ins. Co.*, 4 Metc. 311; *Vaughen v. Haldeman*, 33 Penn. St. 523; *Rogers v. Crow*, 40 Miss. 91; *Montague v. Dent*, 10 Rich. L. 135; *Shaw v. Lenke*, 1 Daly, 487; *Lawrence v. Kemp*, 1 Duer, 363; *Beck v. Rebow*, 1 P. Wms 94. In respect to such articles, the mere declaration of the owner that he intends that they shall go with the house does not make them realty. They no more constitute part of the realty than would pictures supported by fastenings driven into the wall. Assuming that such fastenings or supports become part of the building, it does not follow that the mirrors or pictures which they support acquire the same character.

On the sale of the house by Curtis to Nelson, the gas fixtures and mirrors were specially bargained for and purchased by Nelson, with the house. They were not mentioned in the deed, nor was any bill of sale of them given, but these were not necessary, for the title to the chattels passed to the purchaser by delivery.

Nelson, after this purchase, executed the mortgage to the defendant, under the foreclosure of which it claims these chattels. He testified that they were in the house when he mortgaged it, and that when he applied for the loan he represented to the defendant that they were to go with the house; that the house included mirrors, gas fixtures and so forth. No mention of them was however made in the mortgage, nor was any separate mortgage of them given.

[Omitting other matters.]

The judgment should be affirmed.

Judgment affirmed.

Al' concur, except ANDREWS, J., absent.

NOTE BY THE REPORTER. — In *Ward v. Kilpatrick*, N. Y. Ct. App, a mechanics' lien was supported as against frames for mirrors and hat-racks under the following circumstances: "The mirror-frames in the present case were actually annexed to the realty; they were so annexed during the process of building, and as part of that process; they were not brought

McKeage v. Hanover Fire Insurance Company.

as furniture into the completed house, but themselves formed part of such completion ; those in the hall filled up and occupied a gap left in the wainscoting ; they were an essential part of the inner surface of the hall, and of a material and construction to correspond with and properly form part of such inner surface, and those in the parlor fitted into a gap purposely left in the baseboard. Both those in the hall and those in the parlor were fastened to the walls with hooks and screws, and they could be removed, but their removal would leave unfinished walls and require work upon the house to supply and repair their absence. They were fitted to the use and purpose for which the part of the building they occupied was designed ; they formed part of the inner wall, and their construction and finish was made to correspond with the cabinet-work of the rooms. In each house they faced each other and formed the most prominent feature of the internal ornamentation. They were intended by the owner to be permanently attached to the buildings and to go with them when sold as essential parts of the construction. Three of the houses were in fact thus sold. The owner testified as to these frames that he regarded them as 'the most attractive portion of the house ;' that he stated to the agent of the maker that it was very important to have a few of the frames in immediately, 'so that a party who would be desirous of purchasing the house could see these mirrors and hat-racks ;' that the agreement with Mr. Evers was that he should go on immediately and put in the frames in two or three of the houses, 'so as to be able to show what the houses would be, without delay ;' that the kind of work he called this particular work that was to be done, was 'cabinet carpentering ;' that on one or more occasions he complained of the work not having been done, adding 'and that I could not get my houses ready for market ;' and that he was very strenuous about having the frames put up, 'because he wished to show the houses to some parties.' These facts indicate very plainly the purpose and intention of the owner to permanently attach the frames to the building and make them a part of the structure. It follows that they became parcel of the realty, and as between vendor and vendee would have passed by deed. The recent case of *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 88, does not conflict with this conclusion. In that case the proof showed that the mirrors 'were not set into the walls ;' were put up after the house had been built ; were capable of being easily detached without interfering with or injuring the walls ; and were as much mere furniture as pictures hung in the usual way. The difference between the cases is obvious. We are of opinion therefore that the work done by the lienor was work upon the house, and that the materials furnished were used in its construction. The objection that no lien attached cannot be sustained."

In *Ex parte Sheen: Re Thomas*, 43 L. T. (N. S.) 638 (English Court of Bankruptcy), a sign-board was painted by David Cox, a celebrated artist, for the tenant of an inn, in 1847, and was fixed to the outside wall by iron holdfasts. In 1866 it was removed, and after having been framed by the then tenant, was placed in the hall of the inn, where it was screwed to a wooden plug let into the wall. *Held*, that this picture was not a fixture but was a chattel, and could not be claimed by the owner of the inheritance. The chief judge said: "It was fixed in front of his house, and at a later period it was taken down and hung up, first in one room and then in another, just as he pleased, and was fastened to the wall by means of an iron screw. The manner of fastening it can have nothing whatever to do with the question. It has been decided over and over again that looking-glasses, which are in no way different in their nature from pictures, may be taken down at any time although they are so fastened."

"Ever since my recollection will serve me there have been many remarkable signs of different trades which have been exhibited over shop doors, and in point of fact at one time bankers used to have sign-boards. I can certainly remember shops that had, but they were never treated as fixtures in the sense in which it is endeavored to make this picture a fixture. They are simply exhibited as signs emblematic of the trade carried on in that particular place, and have no reference whatever to the landlord of the house."

But this was reversed by the Court of Appeal, L. T. (N. S.). JAMES, L. J., said: "I think the real question is whether that was made a fixture, or whether it was so put up for the purpose of conveniently enjoying it as a chattel, or for the purpose of annexing it and improving the house in which it was put up. I come to the latter conclusion, because although the picture is a large one, it is not so heavy that there should be any unusual mode of fixing it up adopted for the purpose of securing the picture. And although no

McKeage v. Hanover Fire Insurance Company.

doubt it was put into the hall so that everybody who came into the hotel might see it without going into any other rooms, in my opinion, from the mode and unusual way in which it was fixed to the wall by means of a plug put in the wall and the holdfast on the picture, it is denoted that the intention was to continue it as the sign-board — what it had previously been up to the change of possession — and the sign-board of the hotel, because valuable as it was, it was thought better to remove it to prevent it from injury by weather. But it was put there still as the sign-board of the inn, that being the better place in consequence of the nature of the sign-board, and consequently, even though there was the power at that time of the tenant to alter the character of it, what she did did not show an intention to make it a chattel, but an intention to continue it as a fixture to the house. But now it is said, that though this was a fixture, it was a tenant's fixture: and I think we must consider it, when first fixed over the door of the house, to have been a tenant's fixture of the then tenant, that is to say, a fixture which before the expiration of his lease he might, if he thought fit, have removed and converted to his own use. But he did not do so, and then, this still being a fixture and fixed up in the old place, a lease is granted to the landlord by another person, who may or not have been the successor in estate to the previous tenant, and nothing whatever is said in that lease about any right to remove that which was the trade fixture of the old tenant. Now, it is said, and could not be disputed, I think, that if there is a lease, during the continuance of which the tenant had the right to remove the trade fixtures or tenant's fixture, and a new lease is granted by the landlord, then, at the expiration of it, it will carry the right to the tenant's fixtures without any thing to show as between the landlord and tenant that the right existing as regards the old lease in respect of tenant's fixtures should continue, because a tenant's fixtures are the landlord's property, unless in a certain time the tenant who has put them up exercises the right which he has of taking them away. If that is not done during the continuance of the lease, and a new lease is granted without any reservation of that right, then, in my opinion, it passes under the new lease as part of the landlord's property, free from any right of the tenant, even if he be the same person (I mean the tenant under the new lease) to exercise the right of the old tenant during the continuance of the old term." LUSH, L. J., said: "It never was a chattel. If she had the right to remove it and turn it into a chattel, she never did so. At the time of the liquidation it remained a fixture, and was as much a fixture, to my mind, as it was when it was affixed to the wall. It had been removed from the wall some few years before, with the consent of the landlord, because the tenant had permission to pull down the front of the house and rebuild it, and then he removed it into the hall, or fixed it to the wall, where it remained down to the time when it was taken away by the trustee, the sign-board inside the house instead of outside the house. But it was then no more a chattel than when it was outside the wall; and even if Mrs. Richards had the right to convert it into a chattel, and to take it away and to restore it as a movable chattel, she did not do so, and at the time the trustee took it down he took it away from the fabric of the house."

Several recent Massachusetts cases on fixtures may be sufficiently reported in this connection. In *Smith Paper Company v. Scrtn*, July 27, 1881, the court said: "We can have no doubt that the table, which is the subject-matter of this suit, became part of the realty when placed in the factory. The factory was for the manufacture of rough plate-glass. When the defendant took her deed of the premises, the factory contained two ovens, in which the plates of glass were tempered and annealed, and two furnaces used for melting in crucibles the substances of which the glass was made. The furnaces rested on solid mason-work, and on the right and left of each was an iron table and a crane. By means of these cranes the crucibles were lifted from their places, and the molten glass poured upon the tables between iron strips of the required thickness, and then rolled by a roller weighing five tons, operated by a hand winch. The plate glass was then removed to the ovens, where after cooling it was tempered and annealed, and then cut into sheets of the required size. No other permanent fixtures appear to have been required and used in the factory. These tables were necessary and essential for the manufacture of plate-glass, and were not adapted to any other use; and it must be presumed that the owner in placing them there intended them to be permanent fixtures to be used in the factory. They rested on brick walls two or three feet high, built upon stone foundations firmly imbedded in the ground, which formed the floor of the factory. These tables seem to have varied some-

Grissler v. Powers.

what in size ; but the table in question was eighteen feet long, ten feet wide, nine inches thick, and weighed thirty-three tons. These iron tables thus became part of the structures supporting them and imbedded in the ground, all portions of which were necessary for their proper use. The fact that they rested by their own weight on the brick-work, and could not be removed without materially disturbing it, did not make them any less a part of the structures placed in the factory. The structures as a whole became a part of the realty."

In *Kimball v. Masters, etc., of Grand Lodge of Masons*, the court said : "The defendant leased certain rooms in its building to Copeland & Tarbell, who placed therein two show-cases. The base of the cases to the height of three feet was occupied by drawers ; above were rows of shelves with doors in front about seven feet high ; and mirrors four feet wide and seven feet high placed in recesses and forming part of the cases. One case had one mirror and the other two. A cornice extended along the entire top, and there was a heavy moulding at the bottom of the cases. They stood upon the marble floor and formed no part of the permanent finish of the room ; but the upper portion of each case was fastened to the wall by nails. The room was large, and one of the cases was thirty feet and the other thirty-nine feet in length." "It is evident from the description of these cases and from the manner in which they were placed in the room, taken in connection with the obvious purpose for which they were to be used, that they formed no part of the realty, but were mere chattels or articles of furniture belonging to the tenant. *Guthrie v. Jones*, 108 Mass. 191 ; *Towne v. Fiske*, 127 id. 125 : s. c., 34 Am. Rep. 353, and note, 354 ; *Park v. Baker*, 7 Allen, 78 ; *Wall v. Hines*, 4 Gray, 256."

In *Southbridge Savings Bank v. Stevens Tool Co.*, the court said : "The defendant having purchased machinery, including this drill, to be used in the manufacture of a patented machine, made an arrangement with Stevens to hire his shop ; and in anticipation of its occupancy, Stevens was authorized by the defendant to remove and did remove the machinery to his shop and set it up ready for use. In view of the character of the drill, the purpose for which and the manner in which it was annexed, we are of opinion that it became a part of the realty as between mortgagor and mortgagee. It was a large, heavy machine, from six to eight feet high, having a base of cast iron, and weighed about a ton. It was firmly fastened to the floor, and was supported by braces attached to the flooring above. It was adapted and designed for use in a machine shop, was purchased by the defendant as a part of the machinery to be used in the manufacture of the patented machine ; and it is found that this or a similar drill would be necessary for a machine shop designed to manufacture the patented machine. Having thus been placed on the premises by direction of the defendant, it passed to the plaintiff under its mortgage from Stevens as a part of the realty."

In *Pratt v. Whittier*, California Supreme Court, August, 1881, in a deed of premises intended and used as a hotel, the grantor reserved the right to remove "furniture, carpets and pictures," but provided that "none of the permanent fixtures or appurtenances to said property shall be removed." Held, that he had no right to remove gas fixtures, a kitchen range, a water-filter, tanks, and mosquito-screens.

GRISSLER V. POWERS.

(81 N. Y. 57.)

Mortgage — trust — estoppel.

B. executed to S., without consideration, a mortgage on real estate for \$20,000. Defendant bought the mortgage from S., for \$16,600, relying upon an affidavit made by B. that the expressed consideration was the true one. B.

afterward sold the premises, the purchaser assuming the mortgage. Defendant sold the mortgage for its face. Plaintiff, as a judgment creditor of B., sued for the difference between the amount so realized and the amount paid by defendant, on the ground of an implied trust. The question of usury was not raised. *Held*, that the action could not be maintained.

ACTION as stated in the head note. The defendant had judgment below.

John J. Townsend, for appellants, cited *Schaefer v. Reilly*, 50 N. Y. 61, 69; *Barnard v. Campbell*, 55 id. 457, 461; s. c., 17 Am. Rep. 208; *Merril v. Tyler*, 2 Seld. Notes, 47; *Lesley v. Johnson*, 41 Barb. 359; *Payne v. Burnham*, 62 N. Y. 69; *Parish v. Wheeler*, 22 id. 511; *Freeman v. Auld*, 44 id. 50, 56; *Ritter v. Phillips*, 53 id. 586; *Parkinson v. Sherman*, 74 id. 88; *Rice v. Peet*, 15 Johns. 503, 504; *Eno v. Woodworth*, 4 N. Y. 249, 252; *Payne v. Burnham*, 62 id. 74.

Thomas V. Cator, for respondent.

ANDREWS, J. This action is without precedent, and cannot be maintained upon principle. The plaintiffs stand in the shoes of Browning, the mortgagor, and the case may be treated as if it was an action brought by him to compel the defendant to account for \$3,400, the difference between the face of the mortgage and the sum for which the defendant purchased it.

The plaintiffs cannot recover upon any right of action arising under the usury statute. The question of usury was not presented by the pleadings, and there is no finding, or request to find, that the mortgage was usurious. Besides if Browning could, under any construction of the transaction, be deemed to have paid the \$3,400 as usury, so as to bring him within the provisions of 1 R. S., part 2, ch. 4, tit. 3, § 3, which gives to any person who has paid for the loan or forbearance of money any greater sum than the legal interest, an action to recover back the excess, no action having been brought by him, or his representatives within one year after the execution of the mortgage, or the sale thereof by Powers, the statutory liability is barred.

The plaintiffs claim to maintain the action upon the theory that Powers having paid but \$16,600 for the mortgage, and having sold it for the full sum secured thereby, and received the whole purchase-

money, holds the excess beyond the \$16,600, in trust for Browning, and is bound to account to him therefor. The plaintiffs ask the court to imply a trust between the parties, contrary to the intention of both, and in face of the fact that Powers took the mortgage upon the faith of Browning's sworn statement made at the time, that it was given for a full consideration. The supposed trust, if established; would deprive the defendant of the advantage of the bargain, into which he was induced to enter by the false statement of Browning. We know of no principle of equity which authorizes the implication of a trust under such circumstances. Trusts may be and often are implied, to prevent fraud and injustice, and for the protection of innocent parties. But Browning stands in no position to call upon a court of equity to disregard his solemn assurance to Powers, that the mortgage was given upon a full consideration, and to award him an interest in the security or its proceeds which he not only did not reserve, but which he intended to vest in Powers.

Browning's representation estopped him from denying its truth, and the effect of the estoppel is not limited to the mere purpose of protecting Powers to the extent of the money which he advanced. The case of *Payne v. Burnham*, 62 N. Y. 69, does not justify such a limitation of the effect of the estoppel. The court held in that case that in an action to foreclose a mortgage, taken by the plaintiff in reliance upon the assurance of the mortgagor that it was a valid instrument, but which was in fact usurious, the mortgagee could enforce it only for the amount paid, and that the operation of the estoppel was restricted to the purpose of indemnity for the money actually advanced, and the mortgage was permitted to be enforced only for that sum. But the principle of that case has no application to the case here. A mortgage or other security affected with usury is void by the statute. But the court held that a mortgagor who has induced another to take a mortgage upon his assurance that the mortgage is valid is estopped from alleging the usury, so as to deprive the purchaser of a remedy to the extent necessary for his reimbursement. Beyond that point however the estoppel will not be allowed to extend. The whole security being void, equity will not extend the estoppel to protect the purchaser beyond the sum advanced. As to any sum beyond that the statute operates, and the security is void.

In this case the usury statute is not in the way, and we are of opinion that as a general rule, the estoppel created by a false repre-

sentation acted upon is commensurate with the thing represented, and operates to put the party entitled to the benefit of the estoppel in the same position as if the thing represented was true, and that when the representation is made on the sale of a chattel or security, the remedy of the purchaser is not limited to a recovery simply of the money advanced, if the purchaser would receive a benefit beyond that if the fact had been as represented.

The case of *Freeman v. Auld*, 44 N. Y. 50, gives no support to the appellant's claim, that a trust in favor of Browning was raised by the transaction in question. In that case the defendant, who was the grantee of the mortgagor, took his conveyance subject to the mortgage, the whole amount of which was reserved by the grantee out of the purchase-money for the payment of the mortgage. The defendant clearly had no equity to claim that the land should not be charged with the lien of the mortgage to the full amount. The mortgage was for a larger sum than was advanced by the mortgagee, but the mortgagee took it to secure only the sum advanced. If the mortgagee had subsequently advanced to the mortgagor the balance of the mortgage, there could be no question of the right of the mortgagee to enforce it for the full amount. This, in substance, was what was done by the assignees of the mortgage. They paid the sum originally advanced by the mortgagee, and took an assignment of the mortgage at the request of the mortgagor, and afterward, by agreement with him, credited the mortgagor on his indebtedness to them with a sum which, together with the sum paid on taking the assignment, amounted to the full face of the mortgage. The mortgage then stood as a valid security to them for its full amount.

The court in disposing of the case put the decision in part at least upon the ground that under the circumstances the original mortgagee held the mortgage for its own benefit to the amount advanced by the mortgagee thereon, and as trustees for the mortgagors for the balance. We see no reason for questioning the soundness of this view, but it does not aid the plaintiffs. The trust in the case cited was raised to carry out the intent of the transaction, and to prevent injustice.

We think the judgment in this case should be affirmed.

Judgment affirmed.

All concur but RAPALLO, J., not voting.

McCORMICK V. HORAN.

(81 N. Y. 86.)

Water and water-courses — surface water — obstruction.

The surface water on the plaintiff's land ordinarily drained into a natural water-course flowing through his land and the defendant's. The plaintiff opened a quarry on his land, and in the winter the surface water, the snow-water, and the water from small streams cut off by the excavation, accumulated in the excavation. In the spring the plaintiff pumped the water from the excavation into the water-course. During this process the flow was greater than usual, but the capacity of the water-course was sufficient to carry it all off, together with the natural body of the stream. Defendant filled up the channel and dammed the stream, thus throwing back the water on plaintiff's land. *Held*, that the plaintiff could compel the removal of such obstructions, and restrict such interference with the flow of the stream.

ACTION as stated in the head note. The plaintiff had judgment below.

W. F. Cogswell, for appellant. Plaintiffs had no right to discharge the water from their quarry, in the unnatural manner and unusual volume adopted by them, upon the defendant's land. 1 Domat (Cushing's ed.), § 1583, p. 616; *Bellows v. Sackett*, 15 Barb. 96; *Bellinger v. N. Y. C. R. R.*, 23 N. Y. 42; *Clinton v. Myers*, 46 id. 511; s. c., 7 Am. Rep. 373; *Merritt v. Parker*, 1 Coxe (N. J.), 460; *Tillotson v. Smith*, 32 N. H. 90; Wash. on Easements, 262, § 17; *Mayor, etc., of Baltimore v. Appold*, 42 Md. 442; *Pettigrew v. Evansville*, 25 Wis. 223; s. c., 3 Am. Rep. 50; *Baird v. Williamson*, 15 J. Scott (N. S.) 391 (15 C. B.); 109 Eng. C. L. 391; *Smith v. Kendrick*, 7 G. & S. 515; 62 Eng. C. L. As its continuance for a sufficient length of time would ripen into a right by prescription, defendant had the right to prevent it by legal proceedings or by resorting to any device, or the erection of any structure which would stop the same, and which he could construct and maintain without a breach of the peace. *Merritt v. Parker*, 1 Coxe (N. J.), 465; *Tillotson v. Smith*, 32 N. H. 90; *Corning v. Troy Iron and Nail Factory*, 40 N. Y. 191.

S. E. Filkins, for respondents.

ANDREWS, J. Water-courses are the means which nature has provided for the drainage of the country through which they pass, and from the natural servitude of lands upon a water-course to receive the waters flowing therein from the lands above, springs the right of the owner of the superior heritage to have the water from his lands, of which the water-course is the natural outlet, drained into and carried off thereby, and the duty of the owner of the inferior and servient tenement not to interfere with or obstruct its passage. But the right to the use of a water-course for the discharge of surface or other waters exists only in respect of waters of which the water-course is the natural outlet, and it does not justify the diversion and turning of the water of one stream into another, not its natural channel, thereby subjecting lands on the stream into which the diversion is made to the servitude or easement of a waterway for the water thus discharged into it. This is the principle upon which several of the cases to which the appellant refers were decided, and they have no application to the case before us. *Merritt v. Parker*, 1 N. J. 460; *Tillotson v. Smith*, 32 N. H. 90; *Mayor, etc., of Baltimore v. Appold*, 42 Md. 442.

The right of an owner of lands, through which a water-course runs, to have the same kept open, and to discharge therein the surface water, which naturally flows thereto, is not however limited to the drainage and discharge of surface water into the stream in the same precise manner as when the land was in a state of nature, and unchanged by cultivation or improvements. The owner of lands drained by a water-course may change and control the natural flow of the surface water therein, and by ditches or otherwise accelerate the flow, or increase the volume of water which reaches the stream, and if he does this in the reasonable use of his own premises, he exercises only a legal right, and incurs no liability to a lower proprietor. *Waffle v. N. Y. C. R. R. Co.*, 53 N. Y. 11; s. c., 13 Am. Rep. 467; *Miller v. Laubach*, 47 Penn. St. 154. This right is subject to the qualification that one owner cannot, by artificial arrangements on his land, concentrate and discharge into the stream surface water, in quantities beyond the natural capacity of the stream to the damage of other owners. *Noonan v. City of Albany*, 79 N. Y. 470; s. c., 35 Am. Rep. 540. The interests of society are promoted by the cultivation and improvement of the soil, the working of mines, and by other industries connected with the use of land, and the rule of law does not prevent the use of water-courses for

People's Bank of City of New York v. Bogart.

artificial drainage, although the volume of the stream is thereby somewhat enlarged, and the water is discharged at a different time or manner from what it would be if the land was kept in a state of nature, provided no material injury is occasioned to other riparian owners. These views are decisive of this case. The plaintiffs, in opening the quarry on their premises, were exercising a lawful right. The excavation made formed a reservoir into which the surface water from the contiguous lands collected, and in the spring, when the plaintiffs commenced their operations, they pumped this water, together with that arising from the melting snows, and what came from the small water-courses cut off by the excavation, into the water-course, which lower down crossed the defendant's farm.

The court found that this water, if the excavation had not been made, would have naturally descended and flowed into the stream, and that although the flow of water when the pumping was going on was greater than it otherwise would have been, the natural capacity of the water-course was sufficient to carry off the water pumped into it, together with the other water running in the stream, and there was no finding that the defendant sustained any damage from the acts of the plaintiffs.

Under these circumstances, the act of the defendant, in filling up the channel and obstructing the flow of the water, was unlawful, and the judgment should therefore be affirmed.

Judgment affirmed.

All concur except DANFORTH, J., taking no part, having been of counsel.

PEOPLE'S BANK OF CITY OF NEW YORK V. BOGART.

(81 N. Y. 101.)

Negotiable instrument — implied warranty — accommodation paper.

On the transfer of a bill by the indorsee, there is no implied warranty or representation that it is drawn against funds, or is not accommodation paper, and the indorsee's mere neglect to communicate the fact, known to him, that it is not drawn against funds and is for accommodation, is not fraudulent.

ACTION to recover money paid for acceptances. The opinion states the case. The defendant had judgment below.

VOL. XXXVII—61

 People's Bank of City of New York v. Bogart.

John Clinton Gray and *Luther R. Marsh*, for appellant. A holder of commercial paper, offering it for sale, is bound to disclose any knowledge he may have of any facts materially affecting and depreciating its value. *Brown v. Montgomery*, 20 N. Y. 287, 292; *Lancey v. Clarke*, 64 id. 212; s. c., 21 Am. Rep. 604; Kerr on Fraud, 94, 95; Add. on Torts, 399; *Clarke v. Bamer*, 2 Lans. 67; 2 Kent Com. 483; *Rawdon v. Blatchford*, 1 Sandf. Ch. 344; *Allen v. Addington*, 7 Wend. 9, 23, 24; *Paddock v. Strobridge*, 29 Vt. 470; *Hill v. Gray*, 1 Stark. 352; *Bench v. Sheldon*, 14 Barb. 73; *Mellish v. Motteux*, Peake's N. P. Cas. 115; 2 Pars. Bills and Notes, ch. 2, § 2, cases cited in note; Add. on Cont. 232; *Azemar v. Cassella*, L. R., 2 C. P. 678; 2 Bl. Com. 466, 469, marg.; 3 Kent Com. 745, marg.; *Hortsmann v. Henshaw*, 11 How. 177-183; *Raborg v. Peyton*, 2 Wheat. 386; 1 Pars. on Bills, 323; 2 Greenl. on Ev., §§ 160, 169, 172; *Mechanics' Bank v. Livingstone*, 33 Barb. 458; 1 Dan. on Neg. Inst., § 534; Story on Bills of Exch., § 12; *Atlantic Ins. Co. v. Boies*, 6 Duer, 583; *Vere v. Lewis*, 3 T. R. 182; *Roach v. Ostler*, 1 Mann. & Ryl. 120; *Clark v. Des Moines*, 19 Iowa, 199; *Fairchild v. Ogdensburg R. R. Co., etc.*, 15 N. Y. 337; *Miller v. Thompson*, 3 M. & G. 576; *Davis v. Clarke*, 6 Q. B. 19.

William Allen Butler, for respondents.

ANDREWS, J. The plaintiff is a banking corporation, organized under the banking laws of this State, carrying on business in the city of New York. The defendants compose the firm of Orlando M. Bogart & Co., note-brokers, and dealers in commercial paper, also carrying on business in that city. The action is brought to recover of the defendants \$34,453.83, the sum paid by the plaintiff on the purchase from the defendants on the 20th, 21st and 22d days of July, 1875, of certain acceptances by Duncan, Sherman & Co., a banking and commission firm in the city of New York, of drafts drawn upon them by one Alexander Burgess, dated at New York, July 19, 1875, payable three months after date. Duncan, Sherman & Co. failed on the 27th of July, and the plaintiff, on the day of the maturity of the paper, tendered it back to the defendants and demanded the repayment of the money paid on the purchase, claiming to rescind the contract for the fraud of the defendants. The fraud alleged is that the defendants concealed from the plaintiff the knowledge possessed by them in respect to the paper, viz.: that

People's Bank of City of New York v. Bogart.

the drawer was a salaried clerk in the employment of Duncan, Sherman & Co., having no other business relations with the firm than as such clerk, and that the acceptances were purchased by the defendants directly from the acceptors.

The evidence shows that the defendants, for several years prior to the transaction in question, had been accustomed to purchase from Duncan, Sherman & Co. their acceptances of paper drawn by Burgess, and sell it in the market. The transactions of this character were frequent, and the plaintiff purchased large amounts of the paper from the defendants, and also from other brokers. The defendants, on the 19th of July, 1875, purchased of Duncan, Sherman & Co. \$70,000 of this paper, paying therefor the nominal amount less their commissions, and interest to the maturity of the paper at the rate of five and one-half per cent per annum. In pursuance of their custom to notify their customers of what paper they had for sale, they immediately sent a written notice to the plaintiff to the effect that they had for sale, acceptances of Duncan, Sherman & Co., stating the price they had paid, and the price for which they would sell the paper, which was a small advance upon their purchase. The plaintiff's president came to the defendants' office and purchased \$15,000 of the paper. The next day he applied to purchase \$15,000 more. The defendants having, in the meantime, sold the whole amount of the \$70,000 of paper purchased on the 19th, purchased on the 20th, of Duncan, Sherman & Co., \$30,000 more of similar paper from which they supplied the additional \$15,000, desired by the plaintiff, and on the succeeding day the plaintiff's president purchased another acceptance of the same character, for \$5,000, which he selected from a large number of securities of other parties which the defendants had for sale. There was no representation of any kind made by the defendants to the plaintiff on the sale of the acceptances beyond what was implied in the offer to sell acceptances of Duncan, Sherman & Co. The plaintiff's president made no inquiry as to their origin, character or consideration. It is to be assumed that the defendants knew that the drafts were not drawn against funds, and that they were issued by Duncan, Sherman & Co., as a means of borrowing money (for that is the clear import of the transaction), and that the plaintiff had no knowledge of these circumstances. But there is no evidence whatever that the defendants had any knowledge or information that Duncan, Sherman & Co. were in embarrassed pe-

People's Bank of City of New York v. Bogart.

cuniary circumstances. The evidence is undisputed that for many years, and up to the day of their failure, the firm of Duncan, Sherman & Co. enjoyed the highest financial credit and standing. The confidence of the defendants in their solvency is indicated by their purchasing Duncan, Sherman & Co.'s paper in large amounts on their own account, and although they purchased for sale and not for investment, yet they took the risk of their solvency, between the time of the purchase and the resale. The plaintiff, in purchasing the paper from the defendants, relied upon the credit of the acceptors as is manifest from the circumstances. The plaintiff's president or officers did not know the drawer, and had purchased the same description of paper on previous occasions, and neither at the time of the transaction in question nor before, did they make any inquiry to ascertain the drawer's identity or responsibility. The plaintiff took the paper without the indorsement of the sellers, and made no inquiry and exacted no warranty. The plaintiff's president was well acquainted with the commercial credit of Duncan, Sherman & Co., and upon that, and that alone, did he rely in purchasing the paper.

We are of opinion that the plaintiff failed to establish a case which would have justified the jury in finding that the defendants committed a fraud in the sale of the paper. The fact that the defendants offered to sell the paper, and did sell it as acceptances of Duncan, Sherman & Co., was not, we think, a representation that it was business paper, drawn against funds or credits of the drawer in the hands of the drawees, or in the ordinary course of business transactions between them. The paper had all the essential requisites of accepted bills of exchange. The drawer and drawees were different parties, and upon the transfer of the paper by Duncan, Sherman & Co., both became liable to the holder upon distinct and independent contracts. *Prima facie*, every acceptance affords a presumption of funds of the drawer in the hands of the acceptor, and of an appropriation of these funds for the use of the drawer (*Raborg v. Peyton*, 2 Wheat. 385), and upon this presumption, remedies are administered. The acceptance is evidence of money had, received by the acceptor for the use of the holder, and an action for money had and received will lie in his favor against the acceptor, and he cannot defeat the action by proof that he accepted without funds. STORY, J., in the case cited, referring to the presumption that the bill is drawn against funds, says: "The case

People's Bank of City of New York v. Bogart.

may indeed be otherwise, and then the acceptor pays the debt of the drawer, but as between himself and the payee, it is not a collateral but an original and direct undertaking." Acceptances without funds, or accommodation acceptances, are certainly not unusual commercial transactions, and this must be well understood among commercial men. *In re Hammond*, 6 De G., M. & G. 699, the Lord Justice KNIGHT BRUCE says: "Now I do not think that the mere circumstance of a man parting with a bill, without saying, this is an accommodation bill, amounts to an implied representation that it is not an accommodation bill; I am not aware of any sufficient reason or authority for so extensive a proposition." The law on the sale of commercial paper implies a warranty on the part of the vendor of title and that the instrument is genuine (*Littauer v. Goldman*, 72 N. Y. 506; s. c., 28 Am. Rep. 171; see also, *Lobdell v. Baker*, 1 Met. 193), and also as stated by Judge STORY that the vendor "has no knowledge of any facts which prove the instrument if originally valid to be worthless either by failure of the maker, or by its being already paid, or otherwise to have become void or defunct." Story on Prom. Notes, § 118. But no case has been cited supporting the proposition that there is any implied warranty or representation on the part of the vendor of a bill valid in the hands of the indorsee, that it was drawn against funds, or that it was not accommodation paper. The bills in question were acceptances, and in law and fact instruments of the description of these offered for sale by these defendants, and purchased by the plaintiff.

In the absence then of any representation by the defendants in respect to the origin or consideration of the bills, the remaining question is whether the defendants were under a legal duty to inform the plaintiff at the time of sale of the circumstances under which they were made. The general proposition is asserted by the learned counsel for the plaintiff, that the holder of negotiable paper who knows a material fact affecting its market value, and who sells it for full value without disclosing such fact, is liable to the purchaser for the amount paid for the paper, if after the discovery of the suppression the purchaser elects to rescind the sale. But the proposition asserted is broader than the recent authorities warrant. The law requires disclosure to be made only when there is a duty to make it, and this duty is not raised by the mere circumstance that the undisclosed fact is material, and is known to the one party, and not to the other, or by the additional circumstance that the party

People's Bank of City of New York v. Bogart.

to whom it is known knows that the other party is acting in ignorance of it. It must be assumed on this appeal, that if at the time of the purchase of the paper it had been known in the community that Duncan, Sherman & Co. were selling their own acceptances in the market it would have created suspicion and affected their credit, and that the plaintiff would not have purchased it. But the fact that Duncan, Sherman & Co. were borrowing under disguise would at most be ground of suspicion of pecuniary embarrassment. The borrowing of money by men engaged in large transactions, as Duncan, Sherman & Co. were, as bankers and dealers in cotton on their own account, and on commission, is certainly not unusual, and this although the borrowers may be persons of large means, and the fact that they borrowed by methods which would not disclose that they were borrowers, would not necessarily be inconsistent with good faith or solvency. It might be inconsistent with both, and it may have been in this case. But the question is, were the defendants under a duty to communicate the discrediting facts within their knowledge, in the absence of any inquiry in respect to the origin of the paper, and when the means of information were accessible to the purchaser, and was their omission to do this an actionable fraud, they having done nothing to mislead or divert inquiry, and all that they did being to offer the paper for sale. We are of opinion that the law did not cast upon them the duty of such disclosure. The defendants were in the attitude of vendors of paper purchased and owned by them. The plaintiff was seeking investment for its funds, and became the purchaser of the paper in reliance on the judgment of its officers as to its value. There was no relation of trust or confidence between the parties. If the plaintiff's president in buying the paper thought of the subject at all, and believed that the bills were drawn against funds, the mistaken belief was not induced by any act or statement of the defendants, and they were under no legal obligation to volunteer to inform him that the fact was otherwise. *Attwood v. Small*, 6 Cl. & Fin. 232; *id.* 441; *Smith v. Hughes*, L. R., 6 Q. B. 597. It was held in *Nichols v. Pinner*, 18 N. Y. 295; s. c., 23 *id.* 264, that the mere omission of a purchaser of goods on credit to disclose his insolvency to the vendor, in the absence of any attempt to defraud, is not such a concealment as will avoid the sale, and yet the fact if known to the seller, would affect his credit. Judge SELDEN, in his opinion in that case, says: "It has never, that I am aware of, been held that a par-

People's Bank of City of New York v. Bogart.

chaser is bound, when no questions are put to him in regard to it, to disclose his own pecuniary condition and means of payment. If he makes no false statements, and resorts to no acts or contrivances for the purpose of misleading the vendor, it is not, I think, a fraud, to say nothing on the subject." See also, *Dambman v. Schulting*, 75 N.Y. 55.

"The general rule," says STORY, "both of law and equity, in respect to concealments, is that mere silence with regard to a material fact which there is no legal obligation to divulge, will not avoid a contract, although it operates to the injury of the party from whom it is concealed." Story on Cont., § 516. See also, Benj. on Sales, 338, and cases cited. The case of *Brown v. Montgomery*, 20 N. Y. 287, was a case of the sale of a post-dated check of a party whose paper had gone to protest on the day the sale was made, which was known to the vendor's agent who made the sale, but who did not disclose the fact to the purchaser. The paper had become worthless by the sudden failure of the drawers, and the court held that the duty of disclosure rested upon the holder of the check under the circumstances of that case. That case furnishes no support to the claim of the plaintiff in this. *Caveat emptor* is the rule of the common law, founded upon wise policy, "to induce vigilance and caution, and to prevent opportunities for deceit, which lead to litigation, by casting upon every man the responsibilities of his own contracts, and to burden him with the consequences of his careless mistake." Story on Cont., § 517. We are of opinion that this rule is applicable to this case, and that the plaintiff, neither upon the facts proved, nor offered to be proved, was entitled to recover.

The judgment should therefore be affirmed.

Judgment affirmed.

All concur, except RAPALLO, J., not voting.

Herrman v. Merchants' Insurance Company.

HERRMAN V. MERCHANTS' INSURANCE COMPANY.

(81 N. Y. 184.)

Insurance — fire — condition — “vacant and unoccupied.”

Plaintiff procured an insurance on his summer dwelling. He removed from it in November, leaving the furniture in it, and leaving it in care of a person residing near it, intending to re-occupy it the next spring. *Held*, that the dwelling was not thus “vacant and unoccupied,” and the insurance was not avoided.*

ACTION on a fire insurance policy. The opinion states the facts. The plaintiff had judgment below.

George W. Parsons, for appellant. The house was vacant and unoccupied within the meaning of the policy. *Whitney v. Black River Ins. Co.*, 9 Hun, 41; 72 N. Y. 117; s. c., 28 Am. Rep. 116; *Paine v. Agricultural Ins. Co.*, 5 N. Y. 619; *Wustum v. City Fire Ins. Co.*, 15 Wis. 138; *Harrison v. City Ins. Co.*, 9 Allen, 231; *Dennison v. Phoenix Ins. Co.*, 9 Ins. L. Journ. 65; *Keith v. Quincy Mut. Ins. Co.*, 10 Allen, 228; *American Ins. Co. v. Padfield*, 78 Ill. 167; *North Am. Ins. Co. v. Zaenger*, 63 id. 464; *Corrigan v. Insurance Co.*, 122 Mass. 298; *Alston v. Old North State Ins. Co.*, 80 N. C. 326; *Sleeper v. New Hampshire Fire Ins. Co.*, 56 N. H. 401; 55 id. 249; *Thayer v. Agricultural Ins. Co.*, 5 Hun, 566; *Wood on Insurance*, § 89, p. 180; *Franklin Savings Ins. Co. v. Central Ins. Co.*, 119 Mass. 240; *Ashworth v. Builders' Ins. Co.*, 112 id. 423; s. c., 17 Am. Rep. 117; *Ætna Ins. Co. v. Burns*, Ky. Court of Appeals, 5 Ins. Law Jour. 69.

N. B. Hoxie, for respondent.

EARL, J. This is an action upon a fire policy, and the defense is a breach of certain warranties contained in the policy.

The insurance was upon a dwelling-house and other buildings, and upon certain personal property therein, and the fire which occasioned the loss occurred in the day time, in April, 1877, and probably was of incendiary origin. The policy contained a condition that it should be void if the premises should become “vacant and unoccupied.” The dwelling-house was a summer residence of

*See *Cook v. Cont. Ins. Co.*, (70 Mo. 610), 35 Am. Rep. 438, and note, 443.

Herrman v. Merchants' Insurance Company.

the plaintiff. He resided in it in the summer and fall of 1876, and removed therefrom in November of that year, and went with his family to the city of New York, intending to return again about the middle of May. He left all his furniture in the house, which was furnished throughout, and left his house in charge of a person who lived near thereto.

We should have had a different question for consideration if the condition had been that the policy should become void if the house should become "vacant or unoccupied," or simply "unoccupied." Here we have the two words joined together, "vacant and unoccupied;" and what do they mean? They should not be taken in any technical or narrow sense. They need not be taken in the sense in which they may have been understood by underwriters, as both parties to this contract were not underwriters, supposed to be familiar with the meaning of such words when used in the business of fire insurance. But they must be taken in their ordinary sense, as commonly used and understood; and if the sense in which they were used is uncertain, as they are found in a contract prepared and executed by the insurer, they should be construed most favorably to the insured. *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405; *Rann v. Home Ins. Co.*, 59 id. 387. We do not progress much by ascertaining what the insurer meant by these words; but we must endeavor to ascertain how the insured understood and could properly understand them — in other words, the meaning which they convey to the common mind.

A dwelling-house is unoccupied when no one lives therein, but is not then necessarily vacant. A house filled with furniture throughout cannot be said to be "vacant," the primary and ordinary meaning of which is "empty." To avoid the policy, the premises must not only be unoccupied but also vacant. Force should be given to both words. This is not a casual contract drawn in haste, in which language has been carelessly used; but is a form of contract used by the defendant in its business, probably adopted with great deliberation, every word of which, as we may suppose, has been carefully weighed. It was not intended that mere non-occupancy should avoid the policy; if it had been, it cannot be supposed that the word "vacant" would have been superadded. It is not necessary to hold that a house with a few articles of furniture in it, from which the owner or tenant has removed, with no definite intention of returning, might not be regarded as vacant, or found to be so by

Herrman v. Merchants' Insurance Company.

a jury. It is sufficient to hold that a house thoroughly furnished, from which the owner has removed for a season, intending to return again and resume possession, is not, in any proper sense, a vacant house. There are many houses in and about the city of New York, and elsewhere, which are occupied only in the summer as summer residences, or only in the winter as winter residences, the furniture remaining in them all the time; and for aught we know, these two words were adopted with a view to insurances upon such houses.

These precise words in conjunction have not often come under consideration in the reported cases. In *Alston v. Ins. Co.*, 80 N. C. 326, there was a condition in the policy like the one under consideration. A tenant who was in possession of the house removed therefrom December 16, 1876, leaving some of his furniture in the house, and no one lived in the house thereafter until January 29 of the next year, when the house was destroyed by an incendiary fire. It was held that the policy was violated and avoided. It did not appear how much furniture was left in the house. As the occupancy had been by a tenant who had removed, the quantity was probably small; and it does not appear that the tenant intended to resume possession of the house, and there was no discussion or question as to the meaning of these two words used in conjunction. In *N. A. Fire Ins. Co. v. Zaenger*, 63 Ill. 464, the policy contained the same condition, but the proof showed that the insured premises were not only unoccupied but absolutely vacant. In *Am. Ins. Co. v. Padfield*, 78 Ill. 167, there was the same condition in the policy, and the tenant removed from the house insured, and surrendered up the possession and control thereof to the insured. He left in the house simply a table, a crib and a straw tick belonging thereto, without, so far as appears, ever intending to return to the house or take the property thus abandoned. It was properly held that the house was vacant and unoccupied. It is true that the judge writing the opinion said (and I think erroneously) that to comply with the condition, some one must live in the house, and that such is the popular meaning of the words used. He said further: "For some purposes, the law might regard the leaving of a few such articles in a house as carrying with them possession in their owner, but in such cases, there must be an intention to thus take and hold possession; but here there was no such intention by the tenant. On the contrary, he disclaimed all possession; but such possession is not occupancy, in the popular sense."

Cone v. Delaware, etc., Railroad Company.

There was also a condition in this policy that if the risk should be increased either "internally or externally," the insured should give proper notice thereof in writing, and have the same entered on the policy, and that any failure to comply with the condition should render the policy void. It is claimed on the part of the defendant that this condition was violated by non-occupancy of the house. Its counsel offered to show that the risk was increased by such non-occupancy, and the proof was rejected. Upon the assumption that the risk was thus increased, we are of opinion that this condition was not violated. The policy contained express conditions as to vacancy and occupancy; and as to the mode in which, and purposes for which, the house was to be used; and it is not to be supposed that this general condition was intended for any of the cases thus specially noticed. What is to be regarded in the business of insurance as an increase of risk is frequently a matter of much difficulty, about which men, even experts, differ. Such general language must therefore be strictly construed against the underwriter, or else one may not know whether he has violated his policy or not, until the verdict of a jury upon disputed evidence. The words "risk increased either internally or externally," do not convey to my mind an increase of risk by removal from the house, but an increase of risk by internal or external changes in the house itself, or its exposure, which manifestly increase the risk of fire so that it is not the same risk insured.

There was no question of fact for submission to the jury, and the court did not err in directing a verdict for plaintiff.

The judgment should be affirmed.

Judgment affirmed.

All concur.

CONE V. DELAWARE, ETC., RAILROAD COMPANY.

(81 N. Y. 206.)

Master and servant — negligence — defective machinery — contributory neglect of co-servant.

A master who negligently employs unsafe and defective machinery is liable to his servant injured in the use of it, by means of its defective condition, although the negligence of a co-servant contributed to the injury.*

* To same effect, *Booth v. Boston and Albany R. Co.* (78 N. Y. 38), 29 Am. Rep. 97, and note, 102.

Cone v. Delaware, etc., Railroad Company.

ACTION of damages for personal injury. The plaintiff was a car repairer in defendant's employ, and was injured by steam escaping from a locomotive engine. The opinion states other facts. The plaintiff had judgment below.

Isaac S. Newton, for appellant.

Scott Lord, Jr., for respondent.

DANFORTH, J. As between the plaintiff and the defendant, it was the duty of the latter to furnish its employees for use in the prosecution of its business good and suitable machinery, and keep it in repair. *Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 562; *Laning v. N. Y. C. R. R. Co.*, 49 id. 521; s. c., 10 Am. Rep. 417; *Flike v. B. & A. R. R. Co.*, 53 N. Y. 549; s. c., 13 Am. Rep. 545; *Corcoran v. Holbrook*, 59 N. Y. 519; s. c., 17 Am. Rep. 369. It was also its duty to furnish for the management of such machinery, careful and trustworthy servants; and if these conditions were fulfilled, the plaintiff, although injured by the negligence of his fellow-servant, could maintain no action against their common principal. *Wright v. N. Y. C. R. R. Co.*, *supra*; *Coon v. S. & U. R. R. Co.*, 5 N. Y. 492. But that is not the case here. The plaintiff was not injured by the negligence of his co-employee, while managing good and suitable machinery. The defendant failed to supply machinery of that character. The engine in question was in many important particulars in bad condition; its fire-box was burned out, its stay-bolts had given way, its cylinders needed boring out, its valves facing; it leaked badly, and its flues were defective; and coming nearer to the immediate cause of the injury inflicted upon the plaintiff, it was found that its throttle-valve leaked, and the thread upon the screw which serves to hold the reverse bar in place, and thus controls the motion of the engine, was so worn as to be useless. As a natural and necessary consequence of the defects last mentioned, the steam escaped from the boiler into the cylinders, the engine was put in motion, and as might have been expected, the accident occurred of which the plaintiff now complains. But more than this, the master mechanic, and also the general superintendent of the road, the superior officer directly representing the defendant, had been notified of these defects, but nevertheless directed the engine to be kept in use, "for" (as one of them said) "they were short of power, and had nothing to put in its place." So far this is the plaintiff's case, and

Cone v. Delaware, etc., Railroad Company.

is conclusive against the defendant unless answered, and what is its defense? Why, as I understand it, it is that the engine was furnished with cylinder cocks; that these cocks if opened would have allowed the steam to escape, thus preventing its accumulation in the cylinder, and its pressure upon the piston; that the engineer omitted to open the cocks, and was therefore guilty of negligence; that it was this negligence which caused the injury, and so the defendant is exonerated! But the cylinder cocks were part of a perfect machine, they were not added to supply the defects, or any of them to which I have above called attention. Therefore the defendant's contention comes to this: We concede that we failed in our duty, we did not supply a suitable machine, but our servant, the engineer, could notwithstanding have so managed that the defect should cause no harm.

If this doctrine is accepted it will loosen the rule of responsibility which now bears none too closely upon corporate conduct. It will seldom happen that unusual care on the part of an engineer would not prevent an accident. In this case he might have opened the cocks, or blocked the wheels, or with extreme care so separated the engine from its train that the two should occupy separate tracks. It now seems that it would have been well to have done one or the other of these things. His omission to do so may have been negligence toward the defendant, but it does not remove the responsibility which attached to it, to furnish good and suitable machinery, or place it upon a subordinate whose duty is to be measured by the degree of skill necessary for its management, and who is not called upon to make good the want of corporate care and attention.

The case is not one for the application of the doctrine of equivalents. Nor could the jury be permitted to inquire whether the exercise of extra diligence or skill on the part of the defendant's servant, the engineer, would not have neutralized the defendant's own negligence. This would require them to determine the "comparative negligence" of master and servant, and "strike a balance of negligence" which, even as between plaintiff and defendant, is not permitted. *Wilds v. H. R. R. Co.*, 23 How. Pr. 492. Neither upon principle nor authority can it be held that negligence of the servant in using imperfect machinery excuses the principal from liability to a co-employee for an injury which could not have happened had the machinery been suitable for the use to which it was applied. Had the injury resulted solely from the servant's negligence, the case

Phoenix Insurance Company v. Church.

would have been different. *Wright v. N. Y. C. R. R. Co., supra.* And so the trial judge held. But the jury found that it did not, and the judgment rendered upon the verdict was properly affirmed.

The reasons given therefore by the learned judge at General Term, *Cone v. Del. L. & W. R. Co.*, 15 Hun, 172, are sufficient, and to them nothing more need be added.

The judgment appealed from should be affirmed with costs.

Judgment affirmed.

All concur.

PHOENIX INSURANCE COMPANY V. CHURCH.

(81 N. Y. 218.)

Negotiable instrument — delivering for antecedent debt — bona fide holder.

A firm, being indebted to the plaintiff, delivered to it a note made by A. for the accommodation of B., and by B. indorsed to the firm; and the plaintiff at the same time surrendered a dishonored check of the firm which they had previously given for the same debt. *Held*, that this did not constitute the plaintiff a *bona fide* holder, so as to exclude proof of a wrongful diversion of the note by the payee.*

ACTION on a promissory note. The facts are sufficiently disclosed in the head note and opinion. The plaintiff had judgment at trial in the Marine Court of the city of New York; this was reversed at the General Term, and the latter order was reversed by the General Term of the Common Pleas.

S. E. Church, appellant in person.

G. Tillotson, for respondent. The surrender of the check was such a parting with value as rendered plaintiff a *bona fide* holder for value. *Young v. Lee*, 12 N. Y. 551; *Brown v. Leavitt*, 31 id. 113; *Day v. Saunders*, 1 Abb. Ct. App. Dec. 495; *Park Bank v. Watson*, 42 N. Y. 490; s. c., 1 Am. Rep. 573; *Chrysler v. Renois*, 43 N. Y. 209; *Paddon v. Taylor*, 44 id. 371; *Clothier v. Adriance*, 51 id. 322; *Pratt v. Coman*, 37 id. 440; *Boyd v. Cummings*, 17 id. 103; *Stettheimer v. Meyer*, 33 Barb. 215; *Powers v. Freeman*, 2

* See *Craighead v. Wells* (8 Baxt. 38), 35 Am. Rep. 685.

Phoenix Insurance Company v. Church.

Lans. 127; *Mechanics and Traders' Bank v. Crow*, 5 Daly, 193; 60 N. Y. 85.

ANDREWS, J. The fact that Faunce took the note in nominal payment of the debt of Brown, Pope & Co., did not constitute him a holder for value, so as to shut out the defense that the note has been wrongfully diverted by the payee from the purpose for which it was made. It is the settled law of this State, that prior equities of antecedent parties to negotiable paper transferred in fraud of their rights will prevail against an indorsee who has received it merely in nominal payment of a precedent debt, there being no evidence of an intention to receive the paper in absolute discharge and satisfaction beyond what may be inferred from the ordinary transaction of accepting or receipting it in payment, or crediting it on account. The law regards the payment under such circumstances as conditional only, and the right of the creditor to proceed upon the original indebtedness after the maturity of the paper is unimpaired. *Rosa v. Brotherton*, 10 Wend. 86; *Payne v. Cutler*, 13 id. 605; *Stalker v. McDonald*, 6 Hill, 93; *Lawrence v. Clark*, 36 N. Y. 128; *Weaver v. Barden*, 49 id. 286; *Moore v. Ryder*, 65 id. 438; *Potts v. Mayer*, 74 id. 594. If the claim that Faunce, or the insurance company (which has succeeded to his rights merely) can recover upon the note, notwithstanding the fraudulent diversion, rests solely upon the fact that it was received by Faunce in payment of the debts of Brown, Pope & Co., it is clear from the authorities cited that it cannot be sustained.

But the plaintiff relies upon another circumstance to sustain the position that it is a holder for value. The original indebtedness of Brown, Pope & Co. to Faunce was for premiums on insurance collected by the firm. In January, 1875, Brown, Pope & Co. gave to Faunce their check on a bank, in ordinary form, in settlement of the balance then due to him. The check, on presentation, was dishonored, and it was presented to the bank for payment on several subsequent occasions, but was not paid, and it is found that the firm, neither at the time the check was drawn, nor at any subsequent time, had funds in the bank out of which the check could have been paid, and that the check was worthless. Faunce held the check until March, when Brown, Pope & Co., who in the mean time had received the note in question from the payee, indorsed it over to Faunce in part payment of the debt of the firm, and he at the time

of the transfer delivered to Brown, Pope & Co. their unpaid check.

It is claimed that the delivering up of the check upon receiving the note constituted Faunce a holder for value of the note. Since the case of *Coddington v. Bay*, 20 Johns. 637, it has been the established law in this State, that to constitute an indorsee of negotiable paper a holder for value, so as to exclude the equities of antecedent parties, it is not sufficient that the transfer should be valid as between the indorser and indorsee, but in addition the latter must have relinquished some right, incurred some responsibility, or parted with value upon the credit of the paper at the time of the transfer. In exact accordance with this principle, and upon grounds which are entirely obvious and satisfactory, it has been frequently held that when a creditor takes from his debtor the note of a third person before maturity, in good faith, in payment of, or as collateral security for, the debt, and in consideration thereof gives up collateral securities held therefor, he becomes to the extent of the collaterals surrendered, a holder for value of the paper, and takes it free from the defenses of antecedent parties. *Bank of Salina v. Babcock*, 21 Wend. 499; *Essex County Bank v. Russell*, 29 N. Y. 673; *Park Bank v. Watson*, 42 id. 490; s. c., 1 Am. Rep. 573; *Chrysler v. Renois*, 43 N. Y. 209.

The question whether the surrender by a creditor to a debtor of the debtor's own note, on taking the negotiable note of a third person, is a parting with value within the rule in *Coddington v. Bay*, and the subsequent cases, first arose in this court in *Youngs v. Lee*, 12 N. Y. 551, where the plaintiffs surrendered to their debtors, on receiving their note, indorsed by the defendant, a prior note of the debtors given for merchandise sold them by the plaintiffs. It was held that the surrender of the prior note constituted the plaintiffs holders for value of the note in suit to the amount of the note surrendered, and entitled them to recover against the indorser, notwithstanding the delivery of the note to them was a diversion of it by the maker from the purpose for which it had been indorsed, the plaintiffs having received it without notice of the diversion. The note surrendered was not due, and this fact is adverted to in the opinion of the court, but that circumstance was not the ground upon which the decision proceeded. In *Day v. Saunders*, 1 Abb. Ct. App. Dec. 495, the plaintiff, on receiving the debtor's note indorsed by the defendant, which was a diversion from the purpose

Phoenix Insurance Company v. Church.

for which it was indorsed, surrendered four notes of the debtor, two of which were due, and two not due. The court said that there was no distinction in principle between the case of a surrender of notes not due, and of notes due, and reversed the judgment of the court below, founded upon this distinction, holding that the plaintiff was a holder for value of the note in suit, to the full amount of the notes surrendered. The question again arose in *Brown v. Leavitt*, 31 N. Y. 113, which was an action against the makers of a promissory note, payable to the order of Zebley & Co., and indorsed by them to the plaintiff's testator in part payment of their note held by him, which he surrendered on receiving the note upon which the suit was brought, and other notes, and a balance in money. The defense alleged was fraud on the part of Zebley & Co. in obtaining the note, but it was not claimed that the indorsee had notice of the fraud when he received it. The evidence to show the alleged fraud was excluded on the trial, and the plaintiff recovered. This court affirmed the judgment, DAVIS, J., saying: "In this State it is settled by abundant authority that this transaction constituted the plaintiff's testator a holder for value of the note in question. A further discussion of the question might lead to a suspicion that the law was in doubt on this point." In *Pratt v. Coman*, 37 N. Y. 440, the court again held that the surrender to a party of his own negotiable note past due, and taking in lieu thereof the negotiable note of a third person, indorsed by the debtor, was a sufficient parting with value to constitute the indorsee a holder for value of the latter note. The counsel for the defendant, as appears from his printed points, sought to distinguish the case from *Brown v. Leavitt*, on the ground that in that case it did not appear that the plaintiff on surrendering the note had any remedy on the original indebtedness for which it was given, while in the case then before the court the note surrendered was given for money loaned by the plaintiff who could still recover on the original consideration. But the court in deciding the case disregarded the circumstance relied upon by counsel to distinguish it from *Brown v. Leavitt*. In *Padon v. Taylor*, 44 N. Y. 371, it was held that the defendant, who had received a warehouse receipt for property fraudulently obtained from the plaintiff in consideration of the surrender to the fraudulent vendee, who was insolvent, of his note, past due, given for money loaned him by the defendant, was a purchaser for value. In *Clothier v. Adriance*, 51 N. Y. 322, one Bennett had purchased mowing

Phoenix Insurance Company v. Church.

machines of the defendants on credit, and on settling his account, gave his notes to the defendants for the purchase-money, and also assigned to them as collateral security a mortgage, a life insurance policy of the value of \$46.58, and notes purporting to be made by a third party. The mortgage and the notes assigned as collateral turned out to be fictitious and fraudulent. Afterward Bennett by fraud procured the plaintiff to indorse his notes, and turned them out to the defendants in payment of his notes given on the purchase of the machines, and they in consideration thereof surrendered to Bennett his original notes and the collaterals. The court held that the defendants were holders for value of the notes indorsed by the plaintiff. HUNT, Com'r, said: "As the surrender of the notes of Bennett forms a sufficient consideration under our authorities, it is not necessary to discuss the effect of the surrender of the other instruments," citing *Brown v. Leavitt*, *Pratt v. Coman*, *Day v. Saunders*, and *Paddon v. Taylor*. In *Mechanics and Traders' Bank v. Crow*, 60 N. Y. 85, the cases of *Brown v. Leavitt* and *Pratt v. Coman*, were cited with approval, but the note surrendered in that case was indorsed by a third person.

In view of this long line of authorities it must be regarded as the settled doctrine in this State that the surrender by a creditor of the past due notes of a debtor, upon receiving from him, in good faith, before maturity, the note of a third person, in place of the note surrendered, constitutes the creditor a holder for value of the note thus taken, and protects him against the defenses and equities of the antecedent parties, and that it is immaterial whether the note surrendered was given to the creditor for goods sold, or money loaned, or under circumstances which would leave the original debt represented by the note in existence, enforceable against the debtor, or whether by surrendering the note, the creditor parted with his entire right of action.

The ground upon which *Youngs v. Lee* and the subsequent cases proceed is, that the surrender of the debtor's note is an extinguishment of the security surrendered, and that such extinguishment is a parting with value within the principle of *Coddington v. Bay*. The surrender of a prior note to the maker, under the circumstances of the cases cited, is unequivocal evidence of an intention, on the part of the parties to the transaction, to extinguish the note surrendered, and is equivalent to an express agreement to that effect. That the actual extinguishment and discharge of a

Phoenix Insurance Company v. Church.

prior debt, upon the transfer of a note of a third person by the debtor to the creditor, is a parting with value by the former, was held in *Bank of St. Albans v. Gilliland*, 23 Wend. 311, and *Bank of Sandusky v. Scoville*, 24 id. 115. If these cases are in any respect inconsistent with prior or subsequent decisions of the court, the inconsistency is to be found in the conclusion that the prior debts were extinguished by the transactions in those cases, a conclusion which, it may be thought, was reached upon evidence, which if the dealing had been between individuals, would not, according to other cases, have been sufficient to establish an extinguishment. But it may well be, that by common understanding and usage, when a note is discounted by a bank to take up a prior note held by the bank against the party procuring the discount, and the avails are credited to him, the transaction is to be regarded as an extinguishment of the prior note although it may not have been actually surrendered. *Slaymaker v. Gundacker's Exr.*, 10 S. & R. 75; *Bank of U. S. v. Daniel*, 12 Pet. 34; *Note to Cumber v. Wane*, 1 Smith's Lead. Cases, 458.

While therefore we do not feel at liberty to disturb the rule established by *Youngs v. Lee* and the subsequent cases, it is quite manifest that the reason upon which they proceed is rather technical than substantial. There seems to be but little ground for holding that the surrender by a creditor of a past due note of a debtor, especially when his remedy upon the original debt remains is a parting with value within the principle of *Coddington v. Bay* and we are not disposed to carry the rule established upon this subject farther than has already been done. We cannot consistently do so if we adhere to the reason of the rule in *Coddington v. Bay*, which, as stated by WOODWORTH, J., is, "that the innocent holder having incurred loss by giving credit to the paper, and having paid a fair equivalent, is entitled to protection."

In this case it is claimed that the surrender of the check of Brown, Pope & Co., was the same as the surrender of the debtor's note in the cases cited. We are of opinion that the cases are distinguishable. The check was not given to represent the debt. It was not taken, or intended, as a security for the debt. It was a false token, taken by Faunce in place of money. Brown, Pope & Co., by drawing and delivering the check, represented to Faunce that they had funds in the bank upon which it was drawn, out of which on presentation it would be paid. They had no funds.

Phoenix Insurance Company v. Church.

The representation was false, and the bank refused to pay the check. It was not a payment of the debt to Faunce, any more than the turning out to him of worthless bank bills on a broken bank would be payment, and returning the check to the drawers was a surrender of nothing of value. It is true that an action on the check against the drawers might have been maintained by Faunce ; but they were at all times liable to him for the debt. It is said that the check operated as an acknowledgment of the debt, and that Faunce, having given it up, would be compelled, if now obliged to seek his remedy against Brown, Pope & Co., to bring his action on the account, in maintaining which, he would or might meet with difficulties, which he would not encounter if he had retained the check. We think that this is quite too slight a circumstance upon which to found a judgment that Faunce was a holder for value of the note. There is no legal presumption that it would be more difficult to prove a claim upon an account than upon a check ; certainly no such presumption can arise upon the circumstances of this case. Our conclusion is, that this action cannot be maintained. It is conceded that Brown, Pope & Co. were not holders for value of the note, according to the law of this State. Faunce did not become such holder on the transfer of the note to him. The plaintiff stands in no better position, having simply succeeded to his rights.

The point is suggested on the brief of counsel that the note having been transferred to the plaintiff in Massachusetts, the transaction is governed by the law of that State, which, it is said, differs from the law of New York upon the point we have considered. It is sufficient to say that the point was not raised on the trial, and no proof was given as to the law of Massachusetts. We cannot take judicial notice that the law of another State differs from our own *McBride v. Farmers' Bank*, 26 N. Y. 450 ; *Leavenworth v. Brockway*, 2 Hill, 201.

The order of the General Term of the Court of Common Pleas, reversing the order of the General Term of the Marine Court, should be reversed, and the order of that court affirmed.

Ordered accordingly.

All concur.

Bennett v. North British, etc., Insurance Company.

BENNETT V. NORTH BRITISH, ETC., INSURANCE COMPANY.

(81 N. Y. 273.)

Insurance — fire — condition — “refined coal or earth oils” — kerosene — waiver.

A fire insurance policy on a stock of goods was conditioned to be void, if “refined coal or earth oils are kept for sale, stored, or used on the premises, without written consent.” On the application the agent inspected the premises, and saw and was informed that kerosene was used for lighting them. *Held*, that such use of kerosene did not avoid the policy.

ACTION on a fire insurance policy. The opinion states the case. The defendant had judgment at trial, which was reversed at General Term.

C. E. Tracy, for appellant.

John L. Hill, for respondent.

ANDREWS, J. The policy contains a condition that “if camphene, burning fluid or refined coal or earth oils are kept for sale, stored or used on the premises without written consent it should be void.” The insurance was upon the stock of wines, liquors and segars, and the fixtures, and wearing apparel of the insured, contained in a building on One Hundred and Twenty-fifth street in the city of New York. The insured at the time and after the policy issued, used kerosene for lighting his premises, without the written consent of the defendant. The circumstances under which the insurance was effected, as found by the referee, are, that McCarthy, the plaintiff’s assignor, made application to the defendant’s agent for insurance upon his stock, fixtures and clothing, and thereupon the agent inspected the premises, saw the means there provided for lighting them, and was informed by McCarthy, and knew that kerosene oil was then used for that purpose; and afterward the agent procured the policy to be issued by the defendant and handed it to McCarthy, receiving from him the premium. The question presented is whether, under these circumstances, the use of kerosene for lighting, without the written consent of the company, avoided the policy. The loss, so far as appears, was not occasioned by the use of kerosene, but this is not material, if its use by the

insured, without the written consent of the company, was under the facts of the case a violation of the condition. The condition makes no mention of kerosene by that designation. Kerosene is obtained from a variety of sources. In the American Encyclopedia (vol. 9, ed. 1874) it is said to be a term "originally employed as a trade-mark for a mixture of certain liquid hydro-carbons, used for purposes of illumination. It has been prepared from bituminous coal, bituminous shales, asphaltum, malthus, wood, resin, fish oil and candle tar." But it is doubtless true, that at the present time, its practical business source is petroleum, from which it is obtained by processes of distillation and refinement. It is therefore in a commercial sense a refined coal or earth oil, and is embraced within the terms used in the policy. But it cannot be supposed, without imputing bad faith to the defendant's agent, that the use of kerosene for lighting was intended to be prohibited. The inference, from the facts found, is that its continued use was contemplated. There was, so far as appears, no suggestion to the contrary. Both parties must have understood that the application was for insurance upon the property in its existing condition and relations. It was the plain duty of the defendant's agent, when he delivered the policy, if he understood that it prohibited the use of kerosene or that a written consent to its use was necessary, to have so informed the insured. If such consent was necessary the policy was a nullity from the beginning. It never had an inception as a valid and binding contract. It is quite possible that the insured was ignorant of the origin of kerosene, and that he might not have known if he read the policy that kerosene was a refined coal or earth oil within the condition. He could only have known it by having knowledge of facts extrinsic to the policy. The acts of the parties were a practical construction of the language of the condition, to the effect that kerosene, as used by the insured, was not within it. It is not a case where the language used unmistakably points to the use of kerosene, or where the insured is seeking to escape from the effect of the condition upon the ground of a parol understanding contrary to its plain import.

We are of opinion that the defendant may also be held to have waived the condition requiring consent in writing, and to be estopped from setting up a forfeiture, for breach thereof, within the case of *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 434, and the cases therein cited.

Avery v. Wilson.

No question arises as to the power of the agent. The defendant was a foreign corporation, and the agent, so far as appears, possessed all the powers of a general agent of the defendant.

The order of the court below should be affirmed, and judgment absolute rendered for the plaintiff upon the stipulation.

Order affirmed, and judgment accordingly.

All concur.

AVERY V. WILSON.

(81 N. Y. 341.)

Contract — sale — part delivery — recovery pro tanto.

The plaintiff contracted to sell and deliver 699 boxes of glass to defendant, delivery to be made at one time. Prior to any delivery the defendant wrote to plaintiff asking for immediate delivery of a small portion, and plaintiff thereupon delivered 365 boxes. The defendant received and used this quantity, and afterward wrote that he wished the order completed in a reasonable time. A correspondence ensued as to the terms of the agreement. The plaintiff subsequently offered to complete, but defendant declined on the ground that the time had elapsed. *Held*, that the plaintiff could recover for the amount delivered.*

ACTION for goods sold and delivered. The opinion states the case. The plaintiff had judgment below.

E. Cowen, for appellant.

Thomas Allison, for respondent.

MILLER, J. The plaintiffs made an oral contract with the defendants, by which they agreed to sell to the defendants, at a price named, 699 boxes of glass, which were to be delivered together at one and the same time. They delivered a portion (365 boxes) of the glass, and the referee found that the defendants received and accepted the same, without objecting or intimating to the plaintiffs that it was received and accepted upon any conditions whatever; and without any notice that they would not thereby consent to become liable to pay for the glass so delivered and accepted, unless and until the residue should be delivered, and the defendants have

* See *Millan v. Malloy* (10 Neb. 238), 35 Am. Rep. 471.

not offered to return the same or any part thereof. He also found that the defendants thereby waived the condition that the whole quantity of boxes should be delivered before they should become liable to pay for the part delivered, and only reserved the right and insisted, from time to time thereafter, that the residue should be delivered, or that the plaintiffs should pay the damages sustained by reason of the omission or neglect to deliver the same.

The question presented is whether the defendants are liable to pay for the boxes of glass actually received and retained by them, without the delivery of the remainder. The general rule in this State is that no action lies upon a special contract for the price agreed upon, until performance of such contract. This rule however has been somewhat qualified in its application, as will be seen by a reference to some of the reported cases.

In *Smith v. Brady*, 17 N. Y. 173, it was held that where, in a contract for the erection of a building upon the land of another, performance is to precede payment and is a condition thereof, the builder, having substantially failed to perform on his part, can recover nothing for his labor and materials, notwithstanding the owner has chosen to occupy and enjoy the erection. It was laid down by COMSTOCK, J., who delivered an opinion which was concurred in by all of the judges, after fully discussing the subject, that a party may retain, without compensation, the benefits of a partial performance, where, from the nature of the contract, he must receive such benefits in advance of a full performance, and by its terms or just construction is under no obligation to pay until the performance is complete. The case of a contract to sell and deliver goods at different times, to be paid for when the whole are delivered, is considered, and it is said: "If the vendor refuses to perform entirely, without good cause, the purchaser is neither bound to pay for nor to return the goods received in part performance;" and the case of *Champlin v. Rowley* (13 Wend. 258), in error (18 id. 187) is cited. It may be remarked that in the latter case the contract was for the sale of hay, which was not to be delivered at one and the same time, on account of which \$100 was paid in advance, and the balance was to be paid when the whole quantity was delivered. In the case at bar the glass was not to be delivered in parcels at different times, and there was to be only one and a single delivery. The remarks of Judge COMSTOCK appear to confine the rule to the cases mentioned; and the authorities which hold that a

Avery v. Wilson.

recovery cannot be had where the contract has been but partially performed are, I think, within the principle laid down. While then the defendants were not bound to accept a delivery of a portion of the boxes of glass, and had a right to reject or retain the same as they saw fit, yet if they elected to receive the part delivered, appropriated the same to their own use, and by their acts evinced that they waived this condition, they became liable to pay for what was actually delivered. This rule is established in numerous reported cases, and the question of waiver is frequently one of fact to be determined by the circumstances and the evidence. *Vanderbilt v. Eagle Iron Works*, 25 Wend. 665; *Corning v. Colt*, 5 id. 253; *Krom v. Levy*, 3 T. & C. 704; 6 id. 253; *Flanagan v. Demarest*, 3 Robt. 173; *Normington v. Cook*, 2 T. & C. 423; *Welch v. Moffat*, 1 id. 575.

The cases which are relied upon to uphold the doctrine that an action will not lie for the price of goods sold, where there has been an acceptance of part, do not go to the extent claimed, and are not adverse to the doctrine of waiver, where a portion has been received and retained and the acts of the vendee evince an intention to waive a delivery of the whole at one and the same time. In *Catlin v. Tobias*, 26 N. Y. 217, the goods were received and used by the vendee under a contract for the delivery of specified quantities at different times, and the quantity delivered being less than that required by the contract, it was held that the breach was a bar to an action for the price, and the vendee was not bound to wait to see whether the vendor would fully perform his contract. This rule does not affect the principle that where there is to be a single delivery at one and the same time and only part of the goods have been received, the vendee may waive the right to insist upon such delivery and become liable to pay for the portion actually accepted and appropriated. *Pratt v. Gulick*, 13 Barb. 297, sustains the doctrine that where a special contract is entered into, which is entire, for the sale and delivery of property, a full performance by the vendor is a condition precedent to his right of action against the vendee for the property delivered by the vendor under the contract. There can be no dispute as to this rule, and it in no way interferes with the ruling of the referee that a delivery of the entire quantity may be waived and the vendee become liable for what actually was delivered. *McKnight v. Dunlop*, 4 Barb. 36, on appeal, 5 N. Y. 537, holds, that where there is a verbal agreement for the sale of

VOL. XXXVII—64

personal property, part of which has been delivered and a part refused, the contract was a valid one, and the plaintiff was entitled to recover damages for the non-delivery of the residue. This case does not bear directly upon the question whether there may be an acceptance and a waiver of an entire delivery, so as to render the defendants liable for what was received by them. The case of *Mead v. Degolyer*, 16 Wend. 635, was an action brought to recover the price of a quantity of timber sold and delivered upon a special contract; and it was held that the vendor was not entitled to recover under a *quantum meruit* for a portion less than the whole quantity agreed to be delivered, notwithstanding that the vendee has consented to a variation of the contract as to price and time of performance. It is manifest in this case that the original contract was only modified and not abandoned; and we do not perceive that it affects the question of acceptance and of waiver which arises in the case at bar. In *Paige v. Ott*, 5 Den. 406, the contract was for the delivery of a quantity of timber upon a given day at a price to be paid upon delivery. A part only was delivered, and the parties agreed that the contract should be considered as performed upon the delivery of another quantity at a still future day. A portion of this was delivered and used by the vendee, and it was held that there could be no recovery for the lumber delivered under either contract. The effect of the parol agreement extending the time was discussed in the opinion, and it was decided that it was only a modification of the first. The question of acceptance and of waiver was not considered, and the parties had themselves agreed as to the effect of a failure to deliver as the contract originally provided.

In most of the cases cited it was contemplated that the performance was not to be done by a single act at one time, but by a succession of acts, and the intention evidently was that all of these should be completed as a condition precedent to a right of recovery. The principle established is that the parties must fulfill the terms of the contract. They have a right however to act outside of the contract by changing its terms and conditions, especially in reference to the time of delivery of the goods sold.

Assuming then that the defendants, after accepting and appropriating the glass received by them, had a right to demand a delivery of the residue, the question arises, whether they intended to insist that the remainder should be delivered before they paid or

became liable to pay for the portion which had already been received and accepted. Although they received and accepted a portion of the boxes of glass, without actual knowledge that the balance would not be delivered, the evidence shows that they used the glass without any notice to the plaintiffs that they insisted upon a delivery of the remainder, or any reservation of the condition precedent. It is also proved that prior to the delivery of any portion of the glass, the defendants wrote to the plaintiffs to forward them at once a small portion, which was described, thus indicating that they did not intend to insist on the delivery of all at one and the same time, and that they were willing to accept a delivery in parcels, as might be convenient. Some days after the delivery of a portion of the glass to the defendants, they also wrote the plaintiffs that they wanted the order completed within a reasonable time, and would like to hear from them as soon as convenient. After this a correspondence ensued which shows that the parties understood the contract differently, the plaintiffs claiming that the sale was made subject to such stock as the plaintiffs had at the time of receiving the order, and the defendants that it was from the stock list furnished by the plaintiffs' agent, and each insisting upon their own construction of the terms of the sale. On the 12th of December, the plaintiffs wrote, notifying the defendants that they had glasses of sizes which would enable them to complete the delivery of the whole number of boxes originally ordered, and offered to do so, upon the thirty boxes which had been shipped on the 16th of October previously, and accepted and received, being allowed as part execution of the contract; and the defendants wrote on the next day declining to receive the glass on the ground that the time for completing the contract had then long since expired. In no part of the correspondence did the defendants claim or take the position that they were not liable to pay for the boxes received, in case the remainder was not delivered. They insisted, until a final disagreement took place, that they were entitled to an amount which was named, and which they stated that they charged to the plaintiffs' account for discount on the list sold from, and the list last furnished, and for damages which they had sustained by reason of the non-delivery of the remainder, and not that they were bound to pay for what had not been delivered. They received part, negotiated for the residue not delivered, claiming damages in consequence thereof, and thus waived strict performance and admitted their liability for

Robinson v. National Bank of Newberne.

the price agreed upon, deducting the charge made for discount or damages. This position is inconsistent with the claim now made, that they were not liable at all.

In view of these facts, there was, we think, sufficient to warrant the finding of the referee, to the effect that the condition was waived. While the defendants had the right to recoup any damages sustained by a failure to deliver the glass as agreed upon, or to bring an action to recover the amount of the same, they cannot, under the pleadings in this action, prevent a recovery for the value of the glass actually delivered, as they have not set up any counter-claim, but simply based their defense on the non-performance of the contract.

The judgment should be affirmed

Judgment affirmed.

All concur.

ROBINSON V. NATIONAL BANK OF NEWBERNE.

(81 N. Y. 885.)

National bank — jurisdiction of State courts over — attachment.

A State court has jurisdiction of an action on contract brought by a resident of the State against a National bank located in another State, except as against a National bank that has committed or is contemplating an act of insolvency.

An attachment can issue from a State court against a non-resident National bank.

PROCEEDINGS to vacate attachment. The opinion states the case. The application was denied below.

A. R. Dyett, for appellant. The court had no jurisdiction to issue the attachment. U. S. R. S. [ed. of 1878], § 5242; *Farmers, etc. Bank v. Dearing*, 91 U. S. 29; *Thomp. Nat. Bk. Cas.* 117; *Cheapeake Nat. Bank v. First Nat. Bank of Baltimore*, 40 Md. 269; *Thomp. Nat. Bk. Cas.* 503; *Central Nat. Bank v. Richland Nat. Bank*, 52 How. Pr. 136; *Rhoner v. First Nat. Bank*, 14 Hun., 126; *Bowen v. First Nat. Bank, etc.*, 34 How. Pr. 408; *National Park Bank v. Gunst* 1 Abb. N. C. 292; Judiciary Act of 1789 [U. S.

Robinson v. National Bank of Newberne.

R. S. 1878], §§ 629, 739, subds. 10 and 11; *Main v. Second National Bank*, 6 Biss. 26; *Crocker v. Marine Nat. Bank*, 101 Mass. 240, 242. The power of Congress to protect National banks from attachment and other process before judgment is unquestionable. *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 34; *Central National Bank v. Richland National Bank*, 52 How. Pr. 136, 137; *Crocker v. Marine National Bank*, 101 Mass. 240, 242; *Chesapeake Bank v. First National Bank of Baltimore*, 40 Md. 269; s. c., 17 Am. Rep. 601; *Cadle v. Tracy*, 11 Blatchf. 102; *Osborn v. Bank U. S.*, 9 Wheat. 783; *Martin v. Hunter's Lessee*, 1 id. 304, 336-337; *The Moses Taylor*, 4 Wall. 411, 429; *Rhoner v. First National Bank, etc.*, 14 Hun, 126. The plaintiff has all the remedy to which he has any just claim in an action against the defendant in the State or Federal courts of North Carolina. *Dudley v. Mayhew*, 3 N. Y. 15; *First Nat. Bank v. Lamb*, 57 Barb. 434; *Farmers', etc., Bank v. Dearing*, 91 U. S. 33, 34.

T. C. Cronin, for respondent.

DANFORTH, J. The case comes here upon appeal by defendant, from an order made by a General Term of the Supreme Court of the fourth department, upon the following facts: The plaintiff resides in this State, and is a creditor of the defendant. The defendant is a banking association, organized under the laws of the United States (title LXII, U. S. Rev. Stat.), and located at Newberne, North Carolina. Upon affidavits showing these and other facts sufficient to bring the case within the provisions of the Code of Civil Procedure in force in this State, an attachment was granted by one of the justices of the Supreme Court, and levied upon property of the defendant in the city of New York. The defendant moved, at the Special Term, to vacate the attachment, but the motion was denied, and the order there made affirmed at General Term. It is from the order of affirmance that this appeal is taken. The defendant seeks to sustain the appeal upon two grounds: First. That the Supreme Court had no jurisdiction over the action. Second. If otherwise, that it had no power to grant the attachment. But notwithstanding the ingenious argument of the learned counsel for the appellant, I think neither position can be sustained.

First. As to jurisdiction.

Robinson v. National Bank of Newberne.

It is not necessary to consider whether Congress might have conferred upon the Federal courts exclusive jurisdiction over actions against National banks, and prohibited the State courts from entertaining them, but this could be done, if at all, only by express language or provisions consistent only with that construction. *Houston v. Moore*, 5 Wheat. 1, and other cases cited *infra*. In its absence, a State court would have the same power and jurisdiction in suits to which a National bank was a party, as if it was an individual. *Bowen v. First Nat. Bank of Medina*, 34 How. Pr. 409; *Cooke v. State Nat. Bank of Boston*, 52 N. Y. 96; s. c., 11 Am. Rep. 667. I do not find such language or provisions in the act under which the defendant is organized. Nor is its existence claimed by the learned counsel for the appellant, who has submitted this case in an exhaustive oral and printed argument. In the latter he says: "And Congress has not only nowhere deprived State courts of jurisdiction of *actions against National banks*, but has expressly conferred it, at the same time conferring a similar jurisdiction upon the Federal courts; but in both cases requiring actions and proceedings against them to be brought *in the State where they are located* and protecting them from attachment and similar process *before judgment*," and asserts that "the plaintiff has all the remedy to which he has any just claim, in an action against the defendant, in the State or Federal courts of North Carolina." The contention then is, that outside of the State where the bank is located, neither Federal nor State courts have jurisdiction, and that redress for any cause of action must be there sought. And as it has been held that the statute referred to extends to actions *by*, as well as *against* these corporations (*Kennedy v. Gibson*, 8 Wall. 498), it would follow that the bank must confine its operations to the limits of its own State, or be deprived of legal and judicial aid to enforce its rights. This construction seems to be unwarranted. By the very conditions of its being, the defendant was endowed with certain powers and privileges, in the exercise of which it might be brought into relation with citizens of different States, and we might therefore expect that its liability arising therefrom could be enforced in the same manner, and to the same extent as if it was a natural person, and not a creation of the law. Its business was to loan money, and discount commercial paper, and although located in North Carolina, its transactions might extend into other States, for its interests would follow the per-

Robinson v. National Bank of Newberne.

son of its debtor, and it would be concerned in the disposition of his property, wherever situated. It is therefore provided that "it may purchase and hold such real estate as may be mortgaged to it in good faith by way of security for debts previously contracted, or such as shall be conveyed to it in satisfaction of similar debts contracted in the course of its dealings, or such as it shall purchase at sales under judgments, decrees or mortgages held by it, or shall purchase, to secure debts due to it." § 5137, sub. 2, 3, U. S. Rev. Stat. It is obvious, then, that it might have occasion to sue its debtor in any State, and resort to the courts therein for protection in the enjoyment of the property which it is thus permitted to acquire. As the owner of property it might also incur liability to citizens of the State, or the municipality where it was situated, and we also find that it may incur a statutory liability to its borrower, and that if it violates the law relating to interest, he may recover back twice the amount of excessive interest paid by him. Against it, therefore the individual might find it necessary to put in motion the machinery of the courts; and from these powers and liabilities a right on either side to do so might be implied.

But this is not left to implication. The statute declares that the defendant may "sue and be sued in any court of law and equity, as fully as a natural person." § 5136, sub. 4. Now such a person, a citizen of North Carolina, might sue in any State where he could find his debtor, or the property of his debtor, and he was liable to be sued in any State where he might happen to be, or where his property could be found, and the proceeding would in the courts of the State be according to the jurisdiction given to them by the State. Such suit might also be brought in the courts of the United States, provided the contending parties were not citizens of the same State. If they were, it could not have been until the passage of the National Banking Act of 1864, § 57, amended March 3, 1873, vol. 17, U. S. Stat. at Large, chap. 269, § 2; § 5198, U. S. Rev. Stat., where it was, among other things, enacted, "that suits, actions, and proceedings, against any association under this act, may be had in any Circuit, District, or Territorial court of the United States, held within the district in which such association may be established." The evident object of this provision was to give the Federal court jurisdiction without regard to the citizenship of the plaintiff. 11 Blatchf. 102. But the same section further provides that such suit, etc., may also be had "in any State, county, or

municipal court, in the county or city in which such association is located, having jurisdiction in similar cases." And as above stated, this section has been construed so as to permit suits by, as well as against the corporation. *Kennedy v. Gibson*, 8 Wall. 498. It is this clause upon which the appellant relies in support of the proposition we are now considering. It has however been already declared in this court, that these words cannot be construed as taking away the jurisdiction of the courts of this State over associations similar to this defendant (*Cooke v. State Nat. Bank of Boston*, 52 N. Y. 96; s. c., 11 Am. Rep. 669), and the argument on which that case rests need not be repeated. It finds confirmation however in the consequences likely to result from a different doctrine. Nor can we suppose that the general power and liability to sue and be sued, given by statute as above stated, was intended to be repealed or modified in this indirect manner. The general liability subjects them to an action in any court in which an individual in like circumstances might be sued, and the subsequent enumeration of particular courts, without words of exclusion, cannot have the effect to deprive other courts of jurisdiction. *Owens v. Woosman*, L. R., 3 Q. B. 469. If it was otherwise, then a citizen of this State having a claim upon land in which a banking association, located in another State, had an adverse interest, would be compelled to go there to assert his rights as against it. Yet the contrary has been held by the Supreme Court of the United States in a recent case. *Casey, Recr., v. Adams*, 102 U. S. 66. Referring to section 5198, above cited, the court holds that it applies to transitory actions only, and not to such as are by law local in their character, WAITE, C. J., saying: "Section 5136 subjects the banker to suits at law or in equity as fully as natural persons, and there is nowhere in the Banking Act any evidence of an intention on the part of Congress to exempt bankers from the ordinary rules of law affecting the locality of actions founded on local things. The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribed generally where one should be sued, included such suits as were local in their character, either by statute or the common law, unless it was expressly so declared. Local actions are in the nature of suits *in rem*, and are to be prosecuted where the thing on which they are prosecuted is situated. To give the act of Congress a different construction would be in effect to declare that a National bank could not be sued at all in a local action where the

Robinson v. National Bank of Newberne.

thing about which the suit was brought was not in the judicial district of the United States within which the bank was located. Such a result could never have been contemplated by Congress."

We may construe the words of section 5198, which confer power to bring suits in certain specified courts as permissive merely, and not mandatory, and therefore not limiting the general rule which permits civil cases arising under the laws of the United States to be prosecuted and determined in the State courts, unless exclusive jurisdiction of them has been vested in the Federal courts, or unless Congress has prohibited the State courts from entertaining jurisdiction of such cases. *Clafin v. Houseman*, 93 U. S. 130; 1 Kent Com. 395, 396; *Bank of United States v. Deveaux*, 5 Cr. 85; *Osborn v. United States Bank*, 9 Wheat. 738; *Teall v. Felton*, 1 N. Y. 537. In *Houston v. Moore*, 5 Wheat. 1, Mr. Justice WASHINGTON, in delivering judgment, says (page 27): "I hold it to be perfectly clear that Congress cannot confer jurisdiction upon any courts but such as exist under the Constitution and Laws of the United States; although the State courts may exercise jurisdiction in cases authorized by the laws of the State and not prohibited by the exclusive jurisdiction of the Federal courts." And that case also holds that the mere assignment of jurisdiction to a particular court does not necessarily render it exclusive. It may very well be that when the right in controversy is created by an act of Congress, and the remedy is prescribed to be by suit in the Federal courts, the State courts have no jurisdiction. But that is not this case, nor are there words of exclusion. If we look into other laws enacted by Congress, and in which provision is made for proceedings before one court rather than another, we shall find a marked difference in language implying clearly a different intent. In title 13, chapter 12, United States Revised Statutes, concerning the judiciary, eight classes of suits and proceedings and litigants of particular character are specified, and as to them it is said: "The jurisdiction vested in the courts of the United States * * * shall be exclusive of the courts of the several States." We cannot doubt that language equally explicit would have been used had a similar purpose been entertained in regard to matters of controversy under the Banking Law. It was not, and for this and other reasons above stated, I am of the opinion that the Supreme Court had jurisdiction of the matter involved in this action.

Second. Is the attachment prohibited?

To determine this we must look at the whole section relating to it. It is section 5242 of the United States Revised Statutes (edition of 1878), and is in these words :

“§ 5242. All transfers of the notes, bonds, bills of exchange, or other evidences of debt, owing to any National banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgment or decrees in its favor; all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding in any State, county or municipal court.”

It is found in title 62, chapter 4, entitled “Dissolution and Receivership,” and although in ordinary cases it is said that the title of an act of Congress is entitled to little, if any, weight (*Hadden v. The Collector*, 5 Wall. 107), yet when it occurs in the revision of the statutes, it cannot be entirely disregarded. It would seem in such a case to indicate, with great certainty, what was in the mind of the legislator. The subject-matter of the section is the transfer of property by a banking association made “after the commission of an act of insolvency, or in contemplation thereof;” and when made under the circumstances therein stated, such transfer, it says, “shall be utterly null and void; and no attachment * * * shall be issued against such association or its property, before final judgment, in any suit, action or proceeding, in any State, county or municipal court.” We concur with the General Term in the opinion that these words of prohibition must be deemed to have the same relation as the other things prohibited, and apply only to insolvent corporations, or one about to become so, and that the object of the entire section is to prevent one creditor of a corporation, whose assets are insufficient to meet its liability, from obtaining a preference, whether it is sought through a voluntary assignment, or transfer or payment, or the form of a legal proceeding. It is plain that this is not the case before us. Nor is the cause of action created by the act; nor does it arise in consequence of the violation

Brill v. Tuttle.

of any of its provisions. It is for breach of contract, a remedy for which, by action, exists at common law, and for the enforcement of which, against the property of a non-resident, the statute has given the suit in question. It is a proceeding *in rem* merely, not *in personam*; for that purpose the court neither has, nor does it assume to have, jurisdiction. *People v. Baker*, 76 N. Y. 87; s. c., 32 Am. Rep. 274. It must therefore, like other proceedings *in rem*, be prosecuted where the thing on which it is founded is situated. *Casey, Rec'r, v. Adams, supra*. The attachment is not to bring the defendant into court; its object is to give the plaintiff execution against the thing attached (*Kilburn v. Woodworth*, 5 Johns. 37; 4 Am. Dec. 321); it does not go beyond it. It is not to compel the payment of debts, but to make the property of absentees liable for their debts. Execution can go no further, either against the property or the person. It is confined to the property taken, and if it cannot be maintained, the plaintiff is remediless, unless he goes out of his own State and into the place where the debtor is located. For as we have seen, according to the appellant's theory, the State court has jurisdiction only in that place, and the same statute which confers it, in like manner restricts the jurisdiction of the Federal courts.

The order appealed from should be affirmed with costs.

Order affirmed.

All concur.

BRILL V. TUTTLE.

(81 N. Y. 454.)

Bill of exchange — assignment — equitable, of money to grow due — notice.

A. & S., being engaged in repairing a house for defendant, called upon him with the plaintiff, and requested him to accept an order in favor of the plaintiff for \$800, or give him a note or some security therefor, which he refused to do. Thereupon A. & S. gave the plaintiff, for value, a written order on defendant for \$800, directing him to "charge same to our account, for labor and materials performed and furnished in the repairs and alterations of the house," etc. The defendant refused to pay or recognize this order. At this time the work was nearly finished, but the amount due was uncertain. *Held*, that the order was an assignment of so much of the amount due or to become due, and a subsequent payment by the defendant to A. & S. in disregard of the order was wrongful, and no defense, to an action on the order *

*See *Jarvis v. Wilson* (46 Conn. 90, 37 Am. Rep. 18).

ACTION on an order for money. The opinion states the case. The plaintiff had judgment at trial, which was reversed at General Term.

Thomas Richardson, for appellants.

Amos H. Prescott, for respondent. The instrument is a bill of exchange, and the defendant could not be charged upon it without proof that he accepted it, in writing, and it could not operate as an assignment. 3 R. S. [5th ed.], § 6, p. 68; *Shaver v. Western Union Telegraph Co.*, 57 N. Y. 463; *Kelley v. Mayor of Brooklyn*, 4 Hill, 264; Chitty on Bills, 158 [Am. ed. of 1839]; *Hall v. City of Buffalo*, 1 Keyes, 193; 2 Abb. Ct. App. Dec. 301; *Luff v. Pope*, 5 Hill, 413, 417; *Harris v. Clark*, 3 N. Y. 93; *Mandeville v. Welch*, 5 Wheat. 277; *Parker v. City of Syracuse*, 31 N. Y. 376; *Hutter v. Ellwanger*, 4 Lans. 8; *Alger v. Scott*, 54 N. Y. 14; *Munger v. Shannon*, 61 id. 251. The distinction that has always existed between a bill of exchange and a check, or order, or draft, drawn on and payable out of some particular or specified fund, still remains. *Attorney-General v. Continental Life Insurance Co.*, 72 N. Y. 325; s. c., 27 Am. Rep. 55; *Reid v. Pryor*, 20 Alb. L. J. 53; *Hutter v. Ellwanger*, 4 Lans. 13; *Ehrichs v. DeMill*, 75 N. Y. 370; Chitty on Bills, 55; *Cook v. Satterlee*, 6 Cow. 108; *Marine Bank v. Jauncey*, 3 Sandf. 260; Edw. on Bills, 144; *McLeod v. Snee*, 2 Str. 762; *Hoyt v. Lynch*, 2 Sandf. 328; *Pope v. Luff*, 5 Hill, 413; *N. Y. and V. Bank v. Gibson*, 5 Duer, 574; *Cowperthwaite v. Sheffield*, 3 N. Y. 243; *Winter v. Drury*, 3 Sandf. 257; *Shuttleworth v. Bruce*, 7 Robt. 161; *Loonie v. Hogan*, 9 N. Y. 435; *Lant & Cook v. Bank N. America*, 49 Barb. 221.

RAPALLO, J. The difficulty in this case consists rather in ascertaining the true construction to be put upon the order, than the legal principles applicable to the case. There can be no doubt as to the rule, that when for a valuable consideration from the payee, an order is drawn upon a third party and made payable out of a particular fund, then due or to become due from him to the drawer, the delivery of the order to the payee operates as an assignment *pro tanto* of the fund, and the drawee is bound, after notice of such assignment, to apply the fund, as it accrues, to the payment of the order and to no other purpose, and the payee may, by action, compel such application. It is equally well established that if a draft be drawn

Brill v. Tuttle.

generally upon the drawee, to be paid by him in the first instance, on the credit of the drawer and without regard to the source from which the money used for its payment is obtained, the designation by the drawer of a particular fund, out of which the drawee is to subsequently reimburse himself for such payment, or a particular account to which it is to be charged, will not convert the draft into an assignment of the fund, and the payee of the draft can have no action thereon against the drawee unless he duly accepts. In all cases therefore in which a particular fund, to accrue *in futuro*, is designated in the draft, and the language is ambiguous, the turning point is whether it was the intention of the parties that the payment should be made only out of the designated fund, when or as it should accrue, or whether the direction to the drawee to pay was intended to be absolute, and the fund was mentioned only as a source of reimbursement, or an instruction as to book-keeping.

The order in this case was in the following words :

“MOHAWK, *August 31, 1876.*

“JEROME TUTTLE :

“Pay Brill & Russell three hundred dollars and charge the same to our account for labor and materials performed and furnished in the repairs and alterations of the house in which you reside, in the village of Mohawk.

“J. P. ACKERMAN & SON.”

If at the time this order was drawn the drawers had to their credit on the designated account, the sum of three hundred dollars or more, and this fact was understood by the parties, there would be no difficulty in holding that the intention was to transfer that credit or balance *pro tanto* to the plaintiffs, by substituting them in the place of the drawers as the recipients thereof. It would be fair to presume in that case that it was intended that the payment should be made out of the balance of account in the hands of the drawee, and not on the general credit of the drawer, and that the direction to charge the payment to that account was an appropriation of such balance to the extent necessary to meet the order. The complaint alleges, and when the plaintiff rested the allegation was sustained by proof, that when the order was drawn, August 31, and when it was presented, September 1, there was a sufficient amount due and admitted to be due from the drawee on the account mentioned in

the order, to pay it. The motion for a nonsuit was therefore properly denied.

The evidence as to the amount due on the account, and as to the admission of the defendant, was however controverted by evidence on his behalf, and that question was submitted to the jury, with the instruction that the plaintiffs were entitled to recover any moneys owing by the defendant to the drawers on the 1st of September, 1876, the day of the presentation of the order to him, and at any time thereafter before the commencement of this suit, on the account mentioned in the order, which were not otherwise appropriated on the 1st of September, and under this charge the jury found for the plaintiff the sum of \$243.

This instruction brings up the question, whether, assuming that the fund to meet the order had not accrued and become payable when it was drawn and presented, the intention was that the payment should be made out of the fund when it should accrue, and that such payment should be charged, when made, against the sums thus becoming due, or whether it was intended as a direction to the drawee to advance the amount of the order without regard to the state of the account, and charge the amount thus advanced to the drawers, and subsequently reimburse himself out of the sums to become due from him to the drawers on the specified account.

Considerable evidence was given of the circumstances surrounding the transaction, and of the negotiations between the parties preceding the giving of the order, and it may be that a mixed question of law and fact was presented which would have justified the court, if requested, in submitting the question of the intentions and understanding of the parties to the jury. But no such request was made; and both parties requested the court to construe the order, and therefore if any question of fact was involved, it was submitted to the decision of the court. It was a conceded fact that the drawers had a contract with the defendant for repairing his house, for which they were to receive \$1,100, and the defendant testified that there was no set time when it was to be paid; that he expected it was to be paid when the work was completed, but advanced from time to time on account of labor, etc. The drawers also did extra work, to the amount of \$93. and the job was nearly completed at the time the order was drawn. It was also an uncontroverted fact, that the drawers owed the plaintiffs \$300; and before drawing the order, one of the drawers and one of the plaintiffs went together to the

Brill v. Tuttle.

defendant, and the defendant testified that they then asked him to accept an order in favor of plaintiffs for \$300, or give them a note or some security for the money, and that he refused. The testimony is conflicting, as to whether the amount then due from the defendant was admitted or discussed. Immediately after this conversation, the order in question was drawn and delivered to the plaintiff. It was several times presented to the defendant, but he refused to pay or recognize it. The amount due from defendant to the drawers, at or after the time of the presentation of the order, on the designated account, was severely litigated on the trial, and the verdict establishes that it was \$243. It can hardly be conceived, that under these circumstances, any of the parties could have understood the order as a request to the defendant to advance \$300, or any part of it, unless it was, or should become, due from him to the drawers on the contract and account for repairs, etc. Its language does not necessarily require such a construction, and if ambiguous, should be interpreted with reference to the circumstances under which it was given. *White's Bank v. Myles*, 73 N. Y. 335. These are all inconsistent with such a view. The defendant had already absolutely refused to accept an order or give any note or security for the money due plaintiffs, and this was known to all the parties, and it would have been idle to draw a draft upon him for any other purpose than as a direction to pay to the plaintiffs such sums as were or might become due to the drawers on their account for repairs, etc. The direction in the order to charge the money to be paid thereon to that account, indicates, we think, sufficiently, in connection with the surrounding circumstances, that the payments were to be made out of the moneys due, or to become due, on the account, and all parties must have so understood it. If such is its true construction, it was an assignment of the fund within all the authorities. It was the plain duty therefore of the defendant, after notice of the plaintiffs' rights, to apply the money in the order, and if he afterward paid it over voluntarily to the drawers, he did so in his own wrong.

The case of *Shaver v. Western Union Telegraph Co.*, 57 N. Y. 459, is relied upon as decisive of this case in favor of the respondent. The circumstances of that case were very peculiar.

The order was drawn in pursuance of a previous special arrangement, known to the payee, whereby the drawer was authorized to revoke it, and this was a controlling circumstance, which deprived it of the character of an absolute assignment. LOTT, Com'r, in

delivering the opinion, says: "Notice was thereby given to the party who advanced money on the faith of the order, that it was not to be considered an absolute assignment of the sums that should become payable at the end of each month, but that it was subject to the right of Borst (the drawer) to revoke it." "Any and every person taking it took it subject to the exercise of that right." The order was revoked by the drawer, and whatever else may have been said is unimportant, as this was the point upon which the case turned.

Kelley v. Mayor, 4 Hill, 263, is also much relied upon. That was not the case of an order drawn by a creditor upon his debtor in favor of a third party, to be charged against the debt, but a negotiable draft drawn by the mayor of the city upon the treasurer, "Pay to A. L. or order \$1,500 for award No. 7 and charge to Bedford road assessment." It was proved as a fact that at the date of the draft the treasurer had no funds in his hands arising from the Bedford road assessment, but such funds came to his hands afterward. It was held that the mere direction of the mayor to the treasurer to what account to charge the draft, did not indicate any intention to assign or appropriate any particular fund, and did not deprive the instrument of its character of a negotiable bill of exchange.

On the other hand expressions somewhat similar, used under different circumstances, have been held to constitute such an appropriation. In *Lowery v. Steward*, 25 N. Y. 239, the language of the order was, pay "on account of twenty-four bales of cotton shipped you as per bill of lading per steamer Colorado." In this case the prior correspondence between the parties was also taken into consideration. In *Parker v. City of Syracuse*, 31 N. Y. 376, a contractor with the city for laying plank sidewalks drew his order on the comptroller. "Pay Parker & Wright \$1,420 on plank-road and sidewalk accounts and charge to my account." In *Alger v. Scott*, 54 N. Y. 14, an order was drawn by a landlord upon his tenant in August, 1866: "Pay to J. R. G. \$346 and charge same to me, account of rent of house 13 Cheever place." No rent was due at the time. The tenant accepted the draft, but it was held that this order of acceptance constituted no defense to an action by the landlord for the rent due November, 1866, on the ground that the order was not a bill of exchange, but an equitable assignment of the rent, and as such void for want of consideration from the

Crispin v. Babbitt.

payee. In *Ehrichs v. De Mill*, 75 N. Y. 370, the language of the order was : " Pay to E. \$400 and charge the same to my account of grading and paving Lexington avenue between Patchen and Broadway as per contract." The words " as per contract " are commented upon as indicating that the intention was that the payment should only be made as required by the contract. See also, *Munger v. Shannon*, 61 N. Y. 251, and *Risley v. Smith*, 64 id. 576. It is useless to multiply references to authorities, for the question in all this class of cases is the same, and it must be determined according to the circumstances of each case. It is whether the draft is drawn upon the general credit of the drawee, or upon a particular fund. When the language is ambiguous, and the order not negotiable, as in the present case, the attendant circumstances may be shown to determine the intention and understanding of the parties. *White's Bank v. Myles*, 73 N. Y. 335.

The order of the General Term should be reversed and the judgment on the verdict affirmed.

Order reversed and judgment affirmed.

All concur ; FINCH, J., not on bench at argument.

CRISPIN V. BABBITT.

(81 N. Y. 516.)

Master and servant — negligence — general superintendent acting as co-servant.

The plaintiff was an employee in defendant's iron-works, which were under the management and control of defendant's agent, B.; the defendant living elsewhere and only occasionally visiting the works. B. carelessly let steam on an engine near which plaintiff was working, whereby the plaintiff was injured. In an action for that injury, the court charged that B. represented the defendant only in respect to the duties confided to him as managing agent, but refused to charge that as to other duties he was to be regarded as a fellow-servant with the plaintiff, and left it as a question of fact. *Held*, that such refusal was error. (See note, p. 524.)

ACTION of negligence for personal injury. The head note and opinions state the facts. The plaintiff had judgment below.

A. J. Vanderpool, for appellant.

Nicholas E. Kernan, for respondent. The defendant was guilty of negligence. *Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 521; s. c., 10 Am. Rep. 417; *Flike v. B. & A. R. R. Co.*, 53 N. Y. 549; s. c., 13 Am. Rep. 545; *Corcoran v. Holbrook*, 59 N. Y. 517; s. c., 17 Am. Rep. 369; *Malone v. Hathaway*, 64 N. Y. 5; s. c., 21 Am. Rep. 573; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; s. c., 3 Am. Rep. 506; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240; s. c., 14 Am. Rep. 598; *O'Connor v. Adams*, 120 Mass. 427; *Mullan v. Phil. & So. M. Steamship Co.*, 78 Penn. St. 25; s. c., 21 Am. Rep. 2; *Mehan v. Syracuse & B. R. R. Co.*, 9 Hun, 457, and 73 N. Y. 585; *Gage v. D. L. & W. R. R. Co.*, 14 Hun, 446; *Murphy v. Smith*, 19 C. B. (N. S.) 361; *Brickner v. N. Y. C. R. R. Co.*, 2 Lans. 506, and 49 N. Y. 672; *Lalor v. Chicago, B. & Q. R. R. Co.*, 52 Ill. 401; s. c., 4 Am. Rep. 616; *Patterson v. P. & N. R. R. Co.*, 76 Penn. St. 389. The act of Babbitt was the direct negligence of the defendant, for Babbitt was the "*alter ego*" of the defendant. *Corcoran v. Holbrook*, 59 N. Y. 369; s. c., 17 Am. Rep. 517; *Malone v. Hathaway*, 64 N. Y. 5; s. c., 21 Am. Rep. 573; *Mullan v. Phila. & So. M. Steamship Co.*, 78 Penn. St. 25; s. c., 21 Am. Rep. 2; *Berea Stone Co. v. Craft*, 31 Ohio St. 287; s. c., 27 Am. Rep. 510; *Pittsb., F. W. & C. Ry. Co. v. Lewis*, 33 Ohio St. 196; Whart. on Neg., §§ 229, 230; Shear. & Redf. on Neg., §§ 102, 103, 104; *Brothers v. Cartter*, 52 Mo. 378; s. c., 14 Am. Rep. 424; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240, 260; s. c., 14 Am. Rep. 598; *Murphy v. Smith*, 19 C. B. (N. S.) 361; *Conway v. Belfast & N. C. Ry. Co.*, 9 Ir., L. T. R. 217.

RAPALLO, J. The liability of a master to his servant for injuries sustained while in his employ, by the wrongful or negligent act of another employee of the same master, does not depend upon the doctrine of *respondeat superior*.

If the employee whose negligence causes the injury is a fellow-servant of the one injured, the doctrine does not apply. *Conway v. Belfast, etc., Ry. Co.*, 11 Irish C. L. 353.

A servant assumes all risk of injuries incident to and occurring in the course of his employment, except such as are the result of the act of the master himself, or of a breach by the master of some term, either express or implied, of the contract of service, or

Crispin v. Babbitt.

of the duty of the master to his servant, viz.: to employ competent fellow-servants, safe machinery, etc. But for the mere negligence of one employee, the master is not responsible to another engaged in the same general service.

The liability of the master does not depend upon the grade or rank of the employee whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow-servant of the other operatives. *Albro v. Agawam Canal Co.*, 6 Cush. 75; *Conway v. Belfast Ry. Co.*, *supra*; *Wood Mast. and Serv.*, § 438. See, also, §§ 431, 436, 437. On the same principle, however low the grade or rank of the employee, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master, which he has confided to such inferior employee. On this principle *Flike v. B. & A. R. R. Co.*, 53 N. Y. 549; s. c., 13 Am. Rep. 545, was decided. CHURCH, C. J., says, at page 553, "The true rule, I apprehend, is to hold the corporation liable for negligence in respect to such acts and duties as it is required to perform as master, without regard to the rank or title of the agent intrusted with their performance. As to such acts the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed."

The liability of the master is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employee performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows. If the act is one which pertains only to the duty of an operative, the employee performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow-servant for its improper performance. *Wood Mast. and Serv.*, § 438. The citation which the court read to the jury from 21 Am. Rep. 2, does not conflict with, but sustains this proposition; it says: "Where the master places the entire charge of his business in the hands of an agent, the neglect of the agent in supplying and maintaining suitable instrumentalities for the work required is a breach of duty for which the master is liable." These were masters' duties. In so far as the case from which the citation is made goes beyond this, I cannot reconcile it with established

principles. In England, by a late act of Parliament, the rules touching the point now under consideration have been modified in some respects, but in this State no such legislation has been had.

The point is sharply presented in the present case, by the 13th, 14th and 17th requests to charge. 13th. That although John L. Babbitt may, as financial agent or superintendent, overseer or manager, have represented defendant, and stood in his place, he did so only in respect of those duties which the defendant had confided to him as such agent, superintendent, overseer or manager.

This the court charged.

14th. That as to any other acts or duties performed by him in and about the defendant's works or business at said works, he is not to be regarded as defendant's representative, standing in his place, but as an employee or servant of the defendant, and a fellow-servant of the plaintiff.

This the court refused to charge, but left as a question of fact to the jury, and defendant's counsel excepted. I think this was a question of law, and that the court erred in submitting it to the jury, but should have charged as requested.

The court was further specifically requested to charge that in letting on the steam John L. Babbitt was not acting in defendant's place. This, I think, was a sound proposition, as applied to the present case. It was the act of a mere operative for which the defendant would be liable to a stranger, but not to a fellow-servant of the negligent employee. As between master and servant it was servant's, and not master's duty to operate the machinery.

The judgment should be reversed.

Judgment reversed.

FOLGER, C. J., ANDREWS and MILLER, JJ., concurred ; EARL, DANFORTH and FINCH, JJ., dissented.

NOTE BY THE REPORTER. — EARL, J., dissenting, said among other things: "It is suggested that John L. Babbitt was not in the line of his duty, when he interfered with the engine at the time of the accident, and that in that act he did not represent or stand in the place of the defendant. Just before the accident, John had ordered the plaintiff and other laborers to put a canal boat into defendant's dry dock and under his direction they did so. After the boat was thus placed, it was necessary to pump the water out of the dock; and there was for that purpose a pump worked by this engine; and the plaintiff and others went to start the pump, and while they were thus engaged, and meeting with some difficulty, John came and let the steam on the engine, for the purpose of aiding them. The suggestion is, that while he may have been the general superintendent and manager of the defendant, standing in his place for other purposes, in this act he was a fellow-servant of the plaintiff. The rule is claimed to be, that where a millman, by

Crispin v. Babbitt.

the appointment of the master, exercises the executive duties of master, as in the employment of servants, and in the selection of machinery, apparatus, tools, structures, appliances and means suitable and proper for the use of other and subordinate servants, then his acts are the acts of the master, for which the master is responsible; but that when such middleman does a mere mechanical act which any laborer could do, or labors with other laborers, his negligence while thus acting is the negligence of a co-laborer, which imposes no liability upon the master to a co-laborer injured by such negligence; that the middleman therefore occupies a dual position, that of a co-servant as to all matters within the scope of the employment and the discharge of such duties as are not personal to, or absolute upon, the master, and as a vice-principal as to all matters where he abuses his authority, or is charged with the discharge of duties which the master himself should have discharged, or which rest upon the master as absolute duties. I have made a thorough examination of the reported cases in this country and in England, and think I may safely affirm that there is no case in which the question was involved, where this dual relation has been recognized and the rule thus laid down. The rule is thus stated in Wood's Master and Servant, §§ 438, 451, 453; and there is a dictum to the same effect by Judge POTTER in *Brickner v. N. Y. C. R. R. Co.*, 2 Lans. 506, 516. The only case I have been able to find in which the precise point was involved and decided is that of *Berea Stone Co. v. Kraft*, 31 Ohio St. 287; a. c., 27 Am. Rep. 510.

"It is the general rule, founded on principles of natural justice, that every person shall be responsible only for his own personal wrongs, including such as he employs or directs another to commit. If one selects a suitable agent to do a lawful and proper act, and is guilty of no negligence in making the selection, or in directing and instructing his agent, and the agent does a negligent or wrongful act, causing injury to another, there is no principle of natural law or abstract justice by which the master can be held responsible for such injury. Judged by such standard, the wrong-doer alone must respond. Whart. Neg., §§ 156, 157; *Coon v. S. & U. R. R. Co.*, 6 Barb. 281; *Fiske v. B. & A. R. R. Co.*, *supra*; *Farwell v. B. & W. R. R. Co.*, 4 Metc. 49, 56. The doctrine of *respondeat superior* has its foundation in public policy. SHAW, C. J., in the case last cited, said that it is adopted 'from general considerations of policy and security.' It has been deemed the wisest and safest rule, that the master who selects the servant and puts him in motion, and reaps the benefit of his labor, should be held responsible for negligent and wrongful acts committed in his service. To enforce the responsibility of the master, the rule has sometimes been invoked that where one of two innocent parties must suffer by the wrongful act of a third party, he must bear the burden of loss who placed the third party in the position which enabled him to commit the wrong. But it is held in England, and in most of the States of this country, that the responsibility of the master employing several servants should not be so far extended as to make him liable for injuries sustained by one servant in consequence of the negligent acts of a co-servant engaged in a common business or employment. As the master's responsibility has been extended by the doctrine of *respondeat superior* from considerations of public policy, so that doctrine has been limited by similar considerations in respect to the master's responsibility to his servant. The limitation has no foundation in abstract or natural justice, and all attempts to place it upon any other foundation than that of public policy will prove unsatisfactory when brought to the test of careful and logical analysis.

"As most of the enterprises of modern times, which contribute to human progress and the welfare of society, must be carried on by numerous servants working to the same end under common masters, it has been supposed that it would cast upon a master too much responsibility to hold him liable for injuries, against which he could by no possibility guard, sustained by one servant from the negligence of a co-servant, and that the servants would be better protected if they were obliged to rely upon their own care and vigilance rather than those of the master. Hence, to enforce the supposed public policy, a fiction has been invented by which the servant is said to assume all the risks of the service in which he engages, which include the risks of injuries caused by the negligence of co-servants engaged in the same common employment. If this fiction were literally applied, if it were held that every servant entering into the service of a master assumed all the risks incident to such service, then the master would not be responsible to such servant for his own negligence, as that would be as much an incident to the service as the negligence of a co-servant. The

maxim volenti non fit injuria would shield the master. But the fiction is not applied to shield the master. He is held responsible for his own negligence, whether engaged in the discharge of the duties peculiar to him as master or working side by side with his servants in the same kind of labor. So the fiction should not be applied to shield the master from responsibility for the negligence of the middleman standing in his place and representing him. Public policy does not require that the doctrine of *respondet superior* should be thus far limited. It is not too much for the master to be responsible for his negligence. He is generally a person selected with care, of superior judgment and skill, and is more generally, than other servants, able to respond to his master for his own negligence. I can perceive no reason founded upon public policy, as there is none founded upon any principle of natural justice, for limiting the doctrine of *respondet superior* in its application to the relation existing between a master and such an agent. The master should be responsible for all his negligence while engaged in his service, because he stands in his place representing him as his *alter ego*; and I can perceive no reason founded on public policy or expediency for enforcing that doctrine in such a case in favor of strangers, which does not exist for enforcing it in favor of the other servants of the common master.

"A rule that a master shall be held responsible for some negligent acts of his representative, and not responsible for other negligent acts, done possibly at the same time, within the scope of his employment in the same service, would be illogical, perplexing and inconvenient. Take the case of a general superintendent of a railway. It is conceded that for negligence in his discharge of the absolute duties which a master owes to his servants, the master — the corporation — would be responsible. But suppose instead of such duties, he should in furtherance of his master's business carelessly perform a mechanical act about which common laborers were also engaged, would there be any reason, founded upon principle or public policy, for distinguishing the two cases and imposing upon the master a liability in the one case and not in the other? Suppose the superintendent carelessly ordered a train to be started, and some one was thus injured, the corporation would undoubtedly be liable for the damages. Would it not be thus liable if, instead of ordering the train to be started by others, he placed his own hand to the lever and carelessly started it himself? Would he be the responsible representative of the corporation in the one case and not in the other? Suppose he was standing upon a train of cars and carelessly started that train himself, causing an injury to some one, and at the same moment of time he carelessly ordered an engineer to start another train, also causing an injury; would the corporation be liable for the damages in the one case and not in the other? The question in all this class of cases, the negligent act and consequent injury being proved, is whether the servant whose act is complained of stood in the place of the master — represented him as his *alter ego*? That is always mainly a question of fact. If he did, then the rule of law to be applied is plain and simple, and is the same which would measure the responsibility of the master to a stranger to his service.

"On the one hand, it is claimed that in determining the responsibility of the master in such cases, we must look solely at the duties which were devolved upon the servant whose acts are complained of, and that if we find that the duty which he was engaged in discharging when he committed the negligent act or wrong was one of those absolute duties which the master owed to his servants, then the master is responsible, no matter what was the grade or position of the servant. On the other hand, I claim the rule to be, that in determining the responsibility of the master for the negligent acts of his servant, we must look solely at the position of such servant, and we must consider the duties devolved upon him, solely for the purpose of determining such position, and if we find that he was the representative of the master, within the rules above stated, then the master must be held responsible for all his acts of negligence committed within the scope of the business intrusted to his hands, as well to co-servants as to strangers.

It cannot be claimed that what John L. Babbitt did was an idle thing, having no pertinency to the business in hand. If he was there in defendant's works, as we have assumed the jury found, standing in his place and having the general charge of his business, then he was empowered to do whatever he saw fit in and about that business and in furtherance of its objects. Whatever he could order or employ another to do, he could do himself. Did he represent the defendant when he ordered the laborers to put the boat into the dry

Burnett v. Snyder.

doct. and not represent him a few minutes later when he put his hands to the engine to further the same work? If he had ordered another servant to do this careless act, the defendant would have been liable, and does the defendant escape liability because John did the act himself? I say, no."

The principal case was followed in *McCoaker v. L. I. R. Co.*, 84 N. Y. 77.

BURNETT V. SNYDER.

(81 N. Y. 550.)

Partnership—what does not constitute.

An agreement between two members of a partnership and a third person, with the knowledge and assent of the other partners, that the third person should share in a certain proportion, in the profits and losses of the two contracting partners in the partnership business, does not make such third person a partner or liable for the partnership debts.

ACCOUNT on account. The opinion states the facts. The plaintiff had judgment below.

William G. Wilson, for appellant.

Aaron Pennington Whitehead, for respondent.

ANDREWS, J. The case of *Burnett v. Snyder*, 76 N. Y. 344, was an action brought to recover a debt owing by the firm of Strang, Platt & Co., to the plaintiff, and Snyder was made a defendant upon the allegation that he was a copartner with the other defendants in that firm. In that case the plaintiff, to sustain the averment that Snyder was a partner, relied upon a written agreement, made December 31, 1869, between Snyder and Peter O. Strang and Ammon Platt, two of the members of the firm of Strang, Platt & Co., executed concurrently with the creation of the partnership, which recited that it was deemed expedient that Snyder should have an interest in and become a copartner in the firm, and which contained a stipulation that Snyder should be entitled to receive one-third of the profits earned and received by Peter O. Strang and Ammon Platt from their interest in the firm of Strang, Platt & Co., and become liable for and pay to them an amount equal to one-third of any losses they, or either of them, might sustain by reason of their connection as copartners, or otherwise with the firm of Strang, Platt & Co. It was claimed on the part of the plaintiff

that Snyder was a partner by the express terms of the agreement, and also, that if as between himself and the other members of the firm of Strang, Platt & Co., he was not a partner, he was a partner as to creditors by reason of a right under his agreement to a participation in the profits. The court decided against the plaintiff upon both propositions, and held that an agreement between one of several members of a firm and a third person, that the latter should be a copartner in the firm did not in law make him a copartner, and that an agreement between one member of a firm and a third person that the latter should be entitled to a share of the profits received by the firm, and pay an equivalent share of his losses, was not such a participation in the profits as to constitute the person receiving such share a partner as to third persons, or make him liable for the firm debts.

This action is one of a series of actions commenced by the plaintiff against the successive firms of Strang, Platt & Co., which firm was first organized in 1863, and reorganized December 31, 1869, and again in May, 1870, to recover debts contracted by the several firms to the plaintiff. The debt sought to be recovered in this action was contracted by the original firm, which remained as originally constituted until the reorganization in December, 1869, except that Ryley, one of the original partners, died in 1867, and his interest was continued by his administrators. The case above referred to was brought to recover the debt to the plaintiff contracted by the firm of December, 1869.

The referee in this case found as a fact that the defendant Snyder was a partner in the original firm of Strang, Platt & Co. If this finding is not sustained by the evidence, it becomes the duty of the court to reverse the judgment.

It is not claimed that the judgment can be sustained on any theory of estoppel. Snyder did not hold himself out as a partner. The plaintiff, while the debt for which this action is brought was accruing, was a clerk in the employment of Strang, Platt & Co., but he did not know, nor did he suppose during this time that Snyder was a member of the firm, nor was he informed that he was a partner until 1874, several years after the final dissolution of the firm. His ignorance, of course, is immaterial, if in fact or law Snyder was a partner, but the duty of establishing that relation, in the absence of any holding out by Snyder that he was a partner, is upon the plaintiff. The original firm of Strang, Platt & Co. was consti-

Burnett v. Snyder.

tuted by written articles of copartnership between Peter O. Strang, Ammon Platt and George W. Ryley. By this instrument these persons constituted the firm. Snyder was not a party to it, and so far as the written agreement of copartnership indicates, he was not a partner in the concern. The finding that Snyder was a partner is based upon the fact, that concurrently with the formation of the copartnership, it was arranged that Snyder should be jointly interested with Ryley in his interest in the firm, that is to say, that Snyder should be entitled to receive one-half of Ryley's profits, and should be liable for one-half of his losses. This arrangement, so far as appears, was not evidenced by any writing executed by the parties. The draft of an agreement was prepared between Ryley and Snyder, conforming to the terms of the oral arrangement, but was not produced, and it does not appear to have been signed.

While the negotiation for forming the partnership was going on, Strang, Platt and Ryley expressed a desire that Snyder should become interested in the proposed business. The business contemplated was the wool brokerage and commission business, and Snyder was a large dealer in wool on his own account, and as purchasing agent for mills with which he was connected. It was at first proposed to Snyder that he should become a copartner in the firm. For prudential reasons, growing out of his relations with third parties, Snyder declined the proposition to become a partner. His refusal to become a partner had no connection with the question of the liability which he would incur to creditors by becoming a partner. It was then proposed that he should take a share of Ryley's interest, and the arrangement was concluded on that basis. The evidence shows that the agreement finally made, so far as Snyder was concerned, was an agreement between him and Ryley, made with the knowledge and concurrence of Strang and Platt, the other members of the firm, and in this respect the case differs from the former one. The business of the firm did not require the contribution of capital and none was contributed by any of the partners. Snyder aided the firm by purchases and consignments of wool, but so far as appears, took no part in the management of the business. The question arises upon these facts, whether Snyder was a partner in the firm, or if not a partner as between himself and the other persons interested, was he such as to creditors.

In *Grace v. Smith*, 2 W. Bl. 998, and *Waugh v. Carvor*, 2 H. Bl. 235, the doctrine was declared, and was deemed to be settled by these

cases, that a participation in the profits of a trade made one liable as a partner to third persons by operation of law, although he was not ostensibly a partner, and although the partnership relation was excluded by the terms of the agreement between him and his associates. This doctrine was followed in England, and was regarded as the true test of partnership as to third persons until the case of *Cox v. Hickman*, 8 H. of L. Cas. 301, in which the doctrine was strongly impugned if not wholly overthrown. It was held in that case that partnership was a branch of the law of principal and agent, and that persons who share the profits of a business do not incur the liabilities of partners unless the business is carried on by them personally, or by others as their real or ostensible agents. The defendants in that case, who were creditors of an insolvent firm carrying on business as the Stanton Iron Works, became parties to a deed of assignments executed by them, and by their debtors, whereby the latter conveyed their property to trustees in trust to carry on the business theretofore carried on by the debtors in the name of the Stanton Iron Company, with power to the trustees to enter into contracts relating to the business, and to divide the net income among the creditors in ratable proportions, and it was held that the creditors who executed the deed were not partners in the business, and were not liable upon bills of exchange accepted by one of the trustees in the name of the company for iron ore purchased and used by them in the business. But we have in this State adhered to the general doctrine established by the earlier English cases, and although it proceeds upon reasons which have not been considered entirely satisfactory, it was applied by this court in the recent case of *Leggett v. Hyde*, 58 N. Y. 272 ; s. c., 17 Am. Rep. 244. But the participation in the profits of a trade which makes a person a partner as to third persons is a participation in the profits as such, under circumstances which give him a proprietary interest in the profits before division as principal trader. *Ex parte Hamper*, 17 Ves. 404 ; Story on Part., § 49 ; Pars. on Part. 74, and the right to an account as partner, and a lien on the partnership assets in preference to individual creditors of the partner. *Champion v. Bostwick*, 18 Wend. 175 ; 3 Kent Com. 25 ; 1 Smith Lead. Cas. 984. It is not every participation in the profits which will make one a partner. Numerous exceptions to the rule have been established. See *Vanderburgh v. Hull*, 20 Wend. 70 ; *Burckle v. Eckhart*, 3 Comst. 132 ; *Richardson v. Hughitt*, 76 N. Y. 55 ;

Burnett v. Snyder.

s. c., 32 Am. Rep. 267. The contract of sub-partnership, which is a contract between one or two partners and a third person by which the latter is to share the profits, or the profits and losses of the partner with whom the contract is made in the firm business, does not constitute such a participation in the profits as will make the person contracting with the partner, a partner in the firm, or liable for the partnership debts. In *ex parte Barrow*, 2 Rose, 252, Lord ELDON said : "I take it to have been long settled that a man may become a partner of A., when A. and B. are partners, and yet not be a member of that partnership which existed between A. and B. In the case of *Sir Charles Raymond*, a banker in the city, a Mr. Fletcher agreed with Sir Charles Raymond that he should be interested so far as to receive a share of the profits of the business, and which share he had a right to draw out from the firm of Raymond & Co. But it was held that he was no partner in that partnership ; had no demand against it ; had no account in it ; and that he must be satisfied with a share of the profits arising and given to Sir Charles Raymond." See, also, *Bray v. Fromont*, 6 Madd. 5 ; *Killock v. Greg*, 4 Russ. 285 ; *Frost v. Moulton*, 21 Beav. 596 ; Coll. on Part., § 27 (6th ed.).

It has been said that the English cases only show, that as between the members of the firm *inter sese*, the party contracting for the profits of one of the parties is not a partner, and Mr. Lindley, referring to the subject, remarks, that before the decision of the House of Lords, in *Cox v. Hickman*, a sub-partner might, perhaps, have been liable to the creditors of the principal firm, by reason of his participation in the profits. Lindley on Part. 55. The doubt expressed by this author was resolved in this court by our former decision.

Applying in this case, to the ostensible agreement made between Snyder and Ryley, the test of partnership adopted in *Grace v. Smith*, as explained in the subsequent cases, Snyder did not become, by virtue of that agreement, a partner in the firm of Strang, Platt & Co. He had no interest in the profits of the firm as profits, but a right simply to demand of Ryley that he should account to him for one-third of his profits, accompanied with an obligation to pay one-third of his losses. He had no joint proprietorship with the members of the firm in the profits before division ; was not entitled to an account as partner, and had no lien on the partnership assets. Tested by the rule in *Cox v. Hickman*, Snyder's position is still

stronger. Strang, Platt & Co. were not his agents for carrying on the business of the firm, and he had no power or right to interfere in its management.

It is claimed that whatever was the form of the arrangement, the intention was that Snyder should be interested as a partner in the firm, and we are referred to the principle that courts will look to the substance and not merely to the form of a transaction to determine its real character. But form may be substance. It is undisputed that Snyder refused to become a partner in the firm. The substituted arrangement was one which the law permitted him to make without involving him in the consequences, or subjecting him to the responsibilities, which flow from a partnership. If the ostensible agreement was not the real one, and the secret agreement was that he was to be a partner, clothed with a partner's rights, he could not escape from the responsibilities of that relation, by showing the ostensible contract. The law would not countenance the evasion, or permit him, under cover of the written agreement, to escape from liability as a general partner. But there is no evidence to show, or from which it can be inferred, that the ostensible agreement was not the real one. It may very well be, that the objection which would naturally exist on the part of the parties for whom Snyder was acting as purchasing agent, to his becoming a partner in a concern from which purchases might be made, would apply to the arrangement actually made, but no question arises here between Snyder and his principals. The motive which induced Snyder, by indirection, to become interested in the business of Strang, Platt & Co., so long as the arrangement made did not operate as a fraud upon the creditors of the firm, is not a material circumstance.

The only point here is, whether the actual transaction made Snyder, in law, a member of the firm, or liable for its debts. We think it did not, and that the judgment should be reversed and a new trial granted.

Judgment reversed.

All concur.

Wayne County Savings Bank v. Low.

WAYNE COUNTY SAVINGS BANK V. LOW.

(81 N. Y. 566.)

Usury — contract made in one State to be executed in another.

The plaintiff, a Pennsylvania banking corporation, agreed in that State with defendant, a citizen of New York, for the renewal of a note, made by the latter and held by the former. The renewal note was made, dated, and payable in New York, and was mailed by the defendant to the plaintiff, with a check for the discount. The discount was at a rate lawful in Pennsylvania but unlawful in New York. *Held*, that the note was not usurious in New York.

ACTION on a promissory note. The head-note and opinion disclose the facts. The plaintiff had judgment below.

Hezekiah Watkins, for appellant. The contract in suit having had its legal inception in this State, and being one that was to be performed here, and having been sued here, should be governed by the law of this State. *Jewell v. Wright*, 30 N. Y. 259; *Dickinson v. Edwards*, 77 id. 573; s. c., 33 Am. Rep. 672; *Tilden v. Blair*, 21 Wall. 241; *Prov. Co. Sav. Bank v. Frost*, 13 Nat. Bk. Reg. 356; *Milne v. Moreton*, 6 Bin. 365; *Mactier's Adm'r v. Frith*, 6 Wend. 104; *Kirkman v. Bank of America*, 2 Cold. 397; *Taylor v. Merch. Fire Ins. Co.*, 9 How. 390; *Eames v. Home Ins. Co.*, 94 U. S. 621; *White v. Corlies*, 46 N. Y. 469; *Howard v. Daly*, 61 id. 362, 365; s. c., 19 Am. Rep. 285; *Hallock v. Ins. Co.*, 26 N. J. L. 268; *Vassar v. Camp*, 11 N. Y. 441; *Trevor v. Wood*, 36 id. 307.

Samuel W. Weiss, for respondent.

RAPALLO, J. In *Dickinson v. Edwards*, 77 N. Y. 573; s. c., 33 Am. Rep. 671, the decision in *Jewell v. Wright*, 30 N. Y. 259, was adhered to, and it was held that where a promissory note was made in this State by a resident thereof, bearing date, and by its terms, payable in this State, with no rate of interest specified, and was delivered to the payees without consideration, to be used by them for their accommodation, without restriction, and was first negotiated by them in another State at a rate lawful there, but greater than that allowed by law in this State, it was usurious and void, there

Wayne County Savings Bank v. Low

being no evidence in the case of any intention on the part of the maker that the note should be discounted or used out of this State.

That case, as well as *Jewell v. Wright*, was distinguished from *Tilden v. Blair*, 21 Wall. 241, expressly upon the ground that in *Tilden v. Blair*, although the acceptance was made payable in New York by the acceptors, who were residents of New York, yet after having accepted in New York they returned the acceptance to the drawer in Illinois, for the purpose and with the intention that it should be negotiated by him in that State. And this court says in its opinion in *Dickinson v. Edwards*, 77 N. Y. 573; s. c., 33 Am. Rep. 671, that that was the controlling fact in *Tilden v. Blair*, and that the ruling consideration was the intention of the acceptors that the draft should be used in Illinois, while in *Jewell v. Wright*, and in the case then before the court there was nothing to show an intent on the part of the maker of the note to give authority to deal with it otherwise than as the law of this State would allow.

The case of *Bank of Georgia v. Lewin*, 45 Barb. 340, and other cases, are distinguished from *Jewell v. Wright* on the same ground, and it may safely be said that the case of *Dickinson v. Edwards* rests upon the ground that there was no evidence of knowledge or intention on the part of the maker of the note that it was to be used out of this State, and that in the absence of such proof it must be governed by the law of the place of payment.

In the present case the fact which was wanting in *Jewell v. Wright* and *Dickinson v. Edwards* clearly appears, and the case is brought within the principle of *Tilden v. Blair*, and the cases which have followed it. The note now in suit was dated and made payable in New York, but it was made for the express purpose of being used in renewal of another note for the same amount then held by the plaintiff, a bank in Pennsylvania. The note in suit was actually written in Pennsylvania in the form in use in that State, by the cashier of the plaintiff, at the defendant's request and forwarded by the cashier to the defendant for signature, and was signed by the defendant in New York, and then mailed by him to the plaintiff in Pennsylvania, together with a check for the discount at the rate of eight per cent per annum, which was lawful in Pennsylvania. The note and interest were consequently received by the plaintiff in Pennsylvania, and all this was done in performance of a previous agreement which had been entered into in Pennsylvania between the plaintiff and the defendant. All that was done by

Wayne County Savings Bank v. Low

the plaintiff in New York was simply in execution of that agreement, and as is said in *Dickinson v. Edwards*, p. 580, in citing *Tilden v. Blair*, the designation of the place of payment of the note was an incidental circumstance, for the convenience of the maker and not an essential part of the contract or with the intent to affix a legal consequence to the instrument. It cannot be contended that a party who goes into another State and there makes an agreement with a citizen of that State for the loan or forbearance of money, lawful by the laws of that State, can render his obligation void by making it payable in another State according to whose laws the contract would be usurious. Neither can it be claimed that because the obligation, instead of being signed in the State where the contract was made, is signed in another State and sent by mail to the place of the contract, it must be governed by the usury laws of the place where it was signed. The counsel for the appellant disputes the fact that the agreement for the giving of the note in suit in renewal of the \$2,000 note which fell due, was made in Pennsylvania, but the findings and evidence clearly show that it was. The proposition for the renewal was made by the defendant at Honesdale, in writing, and there received by the plaintiff. In this proposition the defendant requested plaintiff's cashier to send defendant a new note to be signed, which the cashier did. The making of the new note by the cashier and forwarding it to the defendant for execution constituted a clear and definite acceptance of the proposition and made the agreement to renew complete. The sending of the note and check by defendant signed were an execution of this complete agreement. He says he sent the check under a previous agreement. The appellant seeks on this appeal to set up a defense to the note in suit on the ground that the original \$10,000 note was an accommodation note and was discounted in violation of the agreement under which it was loaned, and that the plaintiff did not give full value for it, \$2,000 of the proceeds of the discount having been applied to the payment of a precedent debt of the indorser. It is sufficient to say that the alleged facts on which this defense is based are not found by the referee, nor requested to be found but that on the contrary, the referee found that the \$10,000 note was discounted by the plaintiff for value in the ordinary course of business, and no exception was taken to this finding.

The judgment should be affirmed

Judgment affirmed

All concur.

HALSTEAD V. SEAMAN.

(88 N. Y. 27.)

Arbitration and award — construction of submission — refusal to hear testimony.

Parties entered into an agreement for an arbitration to be "conducted and decided upon the principle of fair and honorable dealing between man and man." On the hearing the parties presented written statements and were heard. One of them proposed to produce witnesses, but the majority of the arbitrators declined to allow it, on the ground that it was prohibited by the submission. *Held*, error.

ACTION to set aside an award, and recover moneys. The opinion states the case. The defendant had judgment below.

Henry J. Scudder, for appellant.

S. P. Nash, for respondent.

RAPALLO, J. The findings of the judge before whom this action was tried at Special Term state, that on the hearing before the arbitrators, the plaintiff and defendant, respectively, presented written statements and were fully heard in respect to the matters set up in such statements, and that thereafter the plaintiff offered to produce as witnesses Sheldon and Brown, but did not show what testimony they could give nor in what respect it was material, and did not produce the witnesses named, and that the arbitrators did not receive the testimony of Sheldon and Brown. But on the settlement of the case, the judge further found, on the plaintiff's request, that two of the arbitrators construed the submission as limiting their powers to the act of passing upon the statements of the parties only, and so ruled and decided. That at the first meeting, the parties respectively submitted statements, and these being contradictory of each other, the plaintiff insisted on calling witnesses in his behalf to disprove the defendant's statements. That the arbitrators refused to allow the plaintiff to produce the witnesses named by him, and refused to receive any evidence other than the statements of the parties. That the plaintiff, on the second and third meetings of the arbitrators, asked permission to introduce testimony to dispose of or clear up the contradictions in the statements, but the arbitrators refused him such permission. That one

Halstead v. Seaman.

of the arbitrators insisted to the others upon the examination of witnesses, in order that the statements made by the parties might be explained, reconciled or better understood, but the other arbitrators refused to do so or to hear any thing but the statements of the parties.

The majority of the arbitrators, having absolutely refused to hear any testimony whatever, or to allow the plaintiff to produce any witnesses, and having placed their refusal upon the ground that under the submission their powers were limited to hearing the statements of the parties, we think that it was not necessary for the plaintiff in order to preserve his rights, to actually produce, or to name his witnesses, or to state what facts he intended to prove by them. He did state that he proposed to disprove by witnesses the defendant's written statement, and was not called upon for any further specification, but was met by an absolute refusal to hear any evidence, and a decision that under the submission the arbitrators had no power to hear any, other than the statements of the parties.

Unless the arbitrators were right in their construction of the submission, the refusal to receive evidence was misconduct which vitiates their award. The refusal of an arbitrator to examine witnesses is sufficient misconduct on his part to induce the court to set aside his award, though he may think he has sufficient evidence without them. *Phipps v. Ingram*, 3 Dowl. 669. In *Van Cortlandt v. Underhill*, 17 Johns. 405, it was held that if the arbitrators refuse to hear evidence pertinent and material to the controversy, it is such misconduct as will vitiate the award. And in *Fudickar v. Guardian Mutual Ins. Co.*, 62 N. Y. 392, it is said by ANDREWS, J., that if an arbitrator refuses to hear competent evidence on the merits, his award will be set aside. If the arbitrators in the present case had called upon the plaintiff to state what he proposed to prove, or had refused to receive the evidence on the ground that he did not show its materiality, then it would be necessary for him, in order to successfully impeach the action of the arbitrators, to show that he made it apparent to them that the evidence he offered to introduce was competent and material. But in view of the ground taken by the arbitrators on the subject, we do not think that this formality was necessary, and that the allegation that the evidence was offered to contradict the defendant's statement was quite sufficient. If their construction of the stipulation was correct, it mat-

Hynes v. McDermott.

tered not how material the testimony was; the arbitrators had no power to receive it, and no statement that he might have upon the subject could have varied the result. 'They absolutely denied his right to produce witnesses for any purpose. Under such circumstances, it would be unjust to deprive him of this right on the ground that he had failed to state the particulars of the offered proof.

'The case must turn upon the correctness of the arbitrators' construction of the submission. On this point, the decision of the arbitrators is not conclusive. No such question was submitted to them. It is for the court to judge whether arbitrators have exceeded their powers, or refused to exercise them. The general rule that their decisions are not reviewable on the mere ground that they are erroneous, is applicable only to their decisions on matters submitted to them. The submission is the foundation of their jurisdiction, and they are not the exclusive judges of their own powers.

The submission in this case is in the usual form, and the only clause relied upon in support of the construction put upon it by the arbitrators reads as follows: "The arbitration shall be conducted and decided upon the principle of fair and honorable dealing between man and man."

There is nothing in this which justified the decision of the arbitrators that the submission limited their powers to the act of passing upon the statement of the parties only. This is too clear for discussion.

The judgment should be reversed and a new trial ordered, costs to abide the event.

Judgment reversed.

All concur, except MILLER, J., absent at argument.

HYNES v. McDERMOTT.

(83 N. Y. 41.)

Marriage — evidence — handwriting — photographs.

To establish a marriage, facts were shown, part occurring in England, part in France, and part on a vessel crossing from England to France. Those occurring in England did not establish a marriage according to the law of

Hynes v. McDermott.

England. The nationality of the vessel or the marriage law of France was not shown. The facts shown being otherwise sufficient to establish a marriage under New York law, *held*, that the nationality of the vessel would not be presumed to be of a country having different marriage laws from New York, nor would the marriage laws of France be presumed different from those laws.

A witness cannot be allowed to give his opinion as an expert on a question of disputed handwriting, founded on a comparison of the disputed signature with photographic copies of other writings not in evidence, and the accuracy of which is not shown by extrinsic testimony.*

A witness cannot be allowed to give his opinion on a question of disputed handwriting, where his knowledge was acquired in the proceedings in the suit, and was based solely on comparison and admissions.†

ACTION of ejectment. The opinion states the case. The plaintiff had judgment below.

John Hallock Drake, for appellants.

Joseph H. Choate, for respondents.

FOLGER, Ch. J. This is an action of ejectment, brought to recover possession of lands once of William R. Hynes, now deceased. He died intestate. The plaintiffs claim to be his widow and his sons respectively. If that be the fact, the right to maintain the action cannot be denied. Whether it be the fact, depends upon the validity, as a marriage contract, of what took place in his lifetime, between the intestate and the plaintiff who now claims to be his widow, and at times before the births of the other plaintiffs. Enough took place at those times, if it had been done in the territory of this State, to have made a valid contract of marriage. Enough took place afterward to furnish a presumption, under the laws of this State, of a prior, legally formed and subsisting marriage relation. By the law of this State, a man and a woman who are competent to marry each other, without going before a minister or magistrate, without the presence of any person as a witness, with no previous public notice given, with no form or ceremony civil or religious, and with no record or written evidence of the act kept and merely by words of present contract between them, may take upon themselves the relation of husband and wife, and be bound to themselves, to the State and to society, as such; and if after

* See note, 28 Am. Rep. 319.† To same effect, *Reese v. Reese* (90 Penn. St. 89), 25 Am. Rep. 634, and note, 635.

that the marriage is denied, proof of actual cohabitation as husband and wife, acknowledgment and recognition of each other to friends and acquaintances and the public as such, and the general reputation thereof, will enable a court to presume that there was in the beginning an actual and *bona fide* marriage. *Brinkley v. Brinkley*, 50 N. Y. 184; s. c., 10 Am. Rep. 460, and cases there cited.

But what passed between the intestate and the adult plaintiff took place out of the territory of this State. Part of it took place upon English soil; and it is conceded that it did not make a lawful marriage, according to the law of England. Part of it took place upon the sea, in a vessel clearing from an English port and crossing the channel to a French port. Part of it took place in France.

In some state of the case here might come in the question, whether, if the acts which would make a valid marriage when done in this State are done outside its bounds, and not in accordance with the law of the place where done, they will make a relation which will be upheld as a valid marriage by the laws of this State?

But this question we need not decide. There is no proof of what is the law of marriage in France, and we will not presume that it is different from that of this State. *Monroe v. Douglass*, 5 N. Y. 447; *Savage v. O'Neil*, 44 id. 298. There is no proof of the nationality of the vessel in which the parties crossed the channel, and we will not presume that it was that of a country whose law of marriage has been proved in this case to be different from that of this State; even if we are required to hold that a vessel on the seas has with it the law of marriage of the nation whose flag it flies. There was enough in the testimony of what took place between the parties at sea, and between them, their friends and acquaintances and the public while they were in France, to sustain the verdict of the jury, that they were husband and wife in accordance with the law of this State. *U. S. Trust Co., Recr., v. Harris*, 2 Bosw. 75. Though they cohabited in England before crossing the channel, the testimony, while it does not prove a marriage in accord with English law, shows enough for a jury to find therefrom that there was the purpose and a form of marriage; that there was a refusal on the part of the woman to commence a meretricious cohabitation, and a yielding on the part of the intestate to her demand for marriage before cohabitation should be had.

A marriage having been thus found on proof enough to sustain the verdict, the legitimacy of the minor plaintiffs, as the sons of the

Hynes v. McDermott.

intestate, is beyond dispute in the case at this time. The judgment for the plaintiffs is to be sustained, unless error is shown by some of the other points made by the defendants.

[Omitting minor points.]

4th. The court did not allow the witness Loader to testify that the handwriting of the signature to the lease of the premises in Leverton street was that of the adult plaintiff. The witness had never seen her write; he had no knowledge of her handwriting save that got by looking upon two writings other than the signature to this lease, which other writings she had acknowledged in his presence and with the writings then before them, to have been penned by her. Those other writings were two signatures of names of persons and one written name of a place of residence, as shown by a signature book kept by a bank at which she had opened two accounts of money deposited by her. These writings were not in evidence in the case; that is, they were not produced before the jury and kept in court throughout the trial. The witness who controlled them was examined beyond the seas on commission. He produced them before the commissioner but refused to part with them. Copies were taken in manuscript by the commissioner and annexed to the deposition of the witness. Copies were also taken by the photographic process and certified to by the commissioner and annexed to the deposition of the witness. The witness Loader was presented to the court as doubly competent to speak on an issue as to the genuineness of handwriting, as an expert, and as having personal knowledge of the handwriting of the adult plaintiff. It does not appear from the case that the trial court determined whether he was qualified to speak as an expert. We will assume that he was, and that had the trial court thought it needful to pass upon the question, it would have held that he was. Yet in our judgment, it was not proper to receive his testimony as that of an expert, and by a comparison of writings. An expert in handwriting, when speaking as a witness only from a comparison of handwriting, that is, with two pieces of it in juxtaposition under his eye, should have before him in court the writing to which he testifies and the writings from which he testifies; else there can be no intelligent examination of him either in chief or cross; nor can there be fair means of meeting his testimony by that of other witnesses. This requirement is included in the rule that there can be no comparison of handwriting, unless the pieces of writing by which

comparison is made are properly in evidence in the case for some purpose other than that of being compared. *Randolph v. Loughlin*, 48 N. Y. 456; *Dubois v. Baker*, 30 id. 355; *Miles v. Loomis*, 75 id. 288; s. c., 31 Am. Rep. 470. The nearest approach to having before the witness at the trial the writings by which comparison had been or was to be made, was the bringing of the photographic copies. There was no proof of the details of the process by which they were taken, nor as to accuracy of the work. We think that a comparison of a signature in dispute, with such photographic copies of other writings, for the purpose of allowing an opinion from an expert as to the character of the signature as real or feigned, when the originals, from which the copies are made, are not brought before the jury, and may not be shown to other witnesses, ought not to be permitted. Photographs that have been taken of persons found dead have been admitted in evidence in this State, in aid of other proofs of identity, but not alone. They were characterized as slight evidence in addition to other and more reliable testimony. *Ruloff v. People*, 45 N. Y. 213. A photographic picture was more unreservedly admitted as evidence upon the question of identity of person in *Udderzook v. Commonwealth*, 76 Penn. St. 340. And in another case, when the genuine signature and the disputed signature were both brought into court, magnified photographic copies of each, together with the originals, were submitted to the inspection of the jury, and it was held not to have been error. *Marcy v. Barnes*, 16 Gray, 162. But copies of letters in a letter-book, produced by impress or by a machine, have been rejected. *Comm. v. Eastman*, 1 Cush. 189. It would be carrying the matter much farther, to permit an expert to compare photographic copies of signatures, and therefrom to testify as to the genuineness of a disputed signature. We may recognize that the photographic process is ruled by general laws that are uniform in their operation, and that almost without exception a likeness is brought forth of the object set before the camera. Still, somewhat for exact likeness will depend upon the adjustment of the machinery, upon the atmospheric conditions, and the skill of the manipulator. And in so delicate a matter as the reaching of judicial results by the comparison of writings through the testimony of experts, it ought to be required that the witness should exercise his acumen upon the thing itself which is to be the basis of his judgment; and still more, that the thing itself should be at hand to be put under

Hynes v. McDermott.

the eye of other witnesses for the trial upon it of their skill. The certainty of expert testimony in these cases is not so well assured as that we can afford to let in the hazard of errors or differences in copying, though it be done by howsoever a scientific process. Besides, as before said, there was no proof here of the manner and exactness of the photographic method used. It was right not to receive Loader's evidence as that of an expert.

The witness was also offered as one having acquaintance with the handwriting of the adult plaintiff. All his means of knowledge have been stated. The testimony was finally rejected, after the objection made to it, that it was a collateral fact whether the lease was signed by the plaintiff, and that the defendants had proved by her that she had not signed it. The objection is not well put, in claiming that the defendants proved by the plaintiff that she did not sign the lease. At one time she said that she did not recognize the signature to it as hers; but she would not say that it was not hers, while she would not admit that it was. At another time she was explicit in denial. But her testimony on this head was not conclusive. Neither can we assent that the fact sought to be proved was a collateral fact, in a sense that precluded the defendants from offering any other testimony upon it than that of the plaintiff herself. She was the witness of the defendants, to be sure, and they could not impeach her. But if she was mistaken in her testimony, or forgetful, so that she could not speak as to a matter, the defendants were not shut out from proving the fact, if material, by other witnesses. It was material, if this plaintiff, during the time that as she now claims she was the wife of Hynes, and entitled and bound to bear his name, was entering into written contracts in another name, which was that of the wife, or widow still unmarried, of another man. The testimony offered tended to prove that. We think therefore that that objection was not good. The prior objection was in effect that Loader had not shown that he was acquainted with the signature of the plaintiff. Testimony as to handwriting is testimony of opinion. Any person acquainted with it may be permitted to give his opinion of it. The acquaintance need not come from having seen the person write. It may be formed from seeing writing under such circumstances as put it beyond doubt that it was a true signature. In this case the witness Loader had seen writing admitted by the plaintiff to be hers; thus he had seen her genuine handwriting. If the case was so confined as

that the correctness of the holding at the Circuit would hang upon whether the view of one piece of genuine handwriting would qualify one to speak as a witness as to the genuineness of another and a disputed signature, we find authority to show that a holding rejecting the testimony would be incorrect. *Hammond v. Varian*, 51 N. Y. 398; *Garrells v. Alexander*, 4 Esp. Cas. 37. The competency of a witness is not determined by the degree of his knowledge. If he has had means of becoming acquainted with the handwriting in question, he is competent to speak, and the weight of his testimony is for the jury. The objection however was broader than that, and covered all the circumstances in which Loader had been placed with regard to this handwriting. It appeared that he was by calling a private detective, and had gone to England as such in the employ of the defendants, after the commencement of this action; that it was while in the pursuit of evidence against the plaintiffs that he learned of this bank book writing; and while engaged in taking the evidence in behalf of the defendants of a witness on commission that he saw the writing and heard the admission of the plaintiff that it was made by her. His acquaintance with her handwriting was from an examination of these two pieces of it; and it was formed while he was, as a hired agent, in quest of testimony with which to combat the plaintiffs' case, and of testimony to be made from the handwriting of the adult plaintiff. It is not to be distinguished from a case of genuine writings furnished to a person to enable him to become a witness as to a disputed signature. It is clear that if the genuine writings had been made or chosen for his inspection by the party who called him as a witness, so as to qualify him to speak, his testimony, to be based upon an acquaintance got from a view of them, would not be received. *Stranger v. Searle*, 1 Esp. N. P. C. 14; *Tome v. Parkersberg R. R. Co.*, 39 Md. 36; s. c., 17 Am. Rep. 540. And it has been held at *nisi prius*, that when the acquaintance is formed from the view of writings admitted by the attorney of the writer to be genuine, the witness will not be allowed. *Greaves v. Hunter*, 2 C. & P. 477. Though, on the other hand, when the genuine writing from which the witness got his knowledge was to a paper filed in the cause by the opposite party, the testimony was allowed. *Smith v. Sainsbury*, 5 C. & P. 196. These cases exemplify how lacking in uniformity are the rulings in this matter, and how delicate a question it is to handle. The last two cases are not directly in point,

Hynes v. McDermott.

inasmuch as it did not appear that the witness, when he saw the genuine writings, was seeking the means of making acquaintance, so that he might testify therefrom. A difference between the case in hand, and those cited above from *Espinasse* and the *Maryland Reports*, is that in the latter two, the genuine signatures were made or chosen by the parties who wished it to appear to the witness that the disputed signature was unlike the genuine ones inspected by him; while in the former, the genuine signature is used in the case, and is admitted to be genuine by the party against whom the witness is called. Still, it is a case of signatures selected in the interest of the party who calls the witness. They were pitched upon by the witness himself, who, in the hire of the party, had been sent in quest of hostile evidence, and that after the commencement of the action. All the stimulus upon him, and all the impulses of his calling, were against impartiality in selection of specimens. The distinction is taken in *Fitzwalter Peerage* case, 10 Cl. & Fin. 193, between the testimony of a witness, who, intending to be a witness, has inspected genuine documents, for the purpose of forming an acquaintance with the characteristics of a certain handwriting, and that of one, who, in the course of business, without having in view the being a witness, has used the same documents, and thus got an acquaintance. In our judgment, the evidence is open to the objections that have been held fatal to testimony as to handwriting created *post litem motam*. We think that upon all that transpired on the trial in the testimony of Loader, and the objections made, the trial court erred not in ruling out the question.

The legislature of this State has, this year (Laws of 1880, chap. 36), passed an act which is intended to allow proof of signature by comparison of handwritings, and which perhaps will forestall for the future much discussion of this topic. That statute however is probably yet to be the subject of judicial interpretation.

[Omitting other points.]

Judgment affirmed.

All concur.

HUN v. CARY.

(88 N. Y. 68.)

Trustee — of savings bank — personal liability for negligence.

A savings bank was incorporated in 1867, and up to 1875, when a receiver was appointed, did business in leased premises. The deposits in the bank at no time exceeded about \$70,000, and during each year but one the expenses of the bank, including interest to depositors, exceeded its income. At a time when the bank was substantially insolvent, the trustees purchased a lot costing \$29,000, on which a building for the use of the bank, costing \$27,000, was erected. In 1875, a receiver was appointed, and this building and lot, subject to a mortgage, and other assets, producing only about \$1,000, constituted the whole property of the bank, and the lot and building were afterward swept away by the mortgage. In an action by the receiver against the trustees for the loss, *held*, that a jury were justified in finding that the trustees failed in exercising the prudence which the law requires, and were liable for the loss sustained.*

ACTION of damages for negligence of trustees. The opinion states the case. The plaintiff had judgment below.

E. Ellery Anderson, for appellants. Trustees are not liable for loss resulting from errors of judgment made in the discharge of their duties. *Scott v. De Peyster*, 1 Edw. Ch. 513; *Spering's Appeal*, 71 Penn. St. 11; s. o., 10 Am. Rep. 684; *Miller v. Proctor*, 20 Ohio St. 442; *Gould v. Branch Bk. of Mobile*, 11 Ala. 191; *Hodges v. N. E. Screw Co.*, 1 R. I. 312; *Harmon v. Tappenden*, 1 East, 555; *Overend v. Gurney*, L. R., 4 Ch. App. 701; Green's Brice's Ultra Vires, note, 407, 408; *Overend v. Gibb*, 5 H. of L. R. 480, 494, Field on Corp. 183, 184, 186; Angell & Ames on Corp., § 314. *Finlay v. Merriman*, 39 Tex. 56, 62; *Ellig v. Naglee*, 9 Cal. 683, 695; *Salter v. Salter*, 6 Bush, 638; *Cross v. Petree*, 10 B. Monr 415. Perry on Trusts, § 276; *Thompson v. Brown*, 4 Johns. Ch. 619, 627, *Knight v. Earl of Plymouth*, 3 Atk. 480; Dickens, 120; *Manhattan Bank v. Lydig*, 4 Johns. 377; 4 Am. Dec. 289; *Clark v. Anderson*, 13 Bush, 111-117; *Griffith v. Follett*, 20 Barb. 620, 634, *Kavanaugh v. City of Brooklyn*, 38 id. 237; *Vanderheyden v. Young*, 11 Johns. 150, 157, *158; *Williams v. Weaver*, 75 N. Y. 30, 33; *Lang*

* Compare *Brown v. French* (125 Mass. 410), 28 Am. Rep. 254.

Hun v. Cary.

v. *Benedict*, 73 id. 12; s. c., 29 Am. Rep. 80; *Hawley v. James*, 5 Pa. Ch. 318; *Perry on Trusts*, § 511; *Tiffany & Bullard on Trusts and Trustees*, 739; *Lewin on Trusts*, *338, 449 *et seq.*; *Hill on Trustees*, *488, 764; *Roosevelt v. Roosevelt*, 64 N. Y. 651; 6 Hun, 35, 42, 43.

Francis C. Barlow, for respondent.

EARL, J. This action was brought by the receiver of the Central Savings Bank of the city of New York, against the defendants, who were trustees of the bank, to recover damages, which, it is alleged, they caused the bank by their misconduct as such trustees.

The first question to be considered is the measure of fidelity, care and diligence which such trustees owe to such a bank and its depositors. The relation existing between the corporation and its trustees is mainly that of principal and agent, and the relation between the trustees and the depositors is similar to that of trustee and *cestui que trust*. The trustees are bound to observe the limits placed upon their powers in the charter, and if they transcend such limits and cause damage, they incur liability. If they act fraudulently or do a willful wrong, it is not doubted that they may be held for all the damage they cause to the bank or its depositors. But if they act in good faith within the limits of powers conferred, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment. That the trustees of such corporations are bound to use some diligence in the discharge of their duties cannot be disputed. All the authorities hold so. What degree of care and diligence are they bound to exercise? Not the highest degree, not such as a very vigilant or extremely careful person would exercise. If such were required, it would be difficult to find trustees who would incur the responsibility of such trust positions. It would not be proper to answer the question by saying the lowest degree. Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to

expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them — the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such a degree of care and prudence, and it is a gross breach of duty — *crassa negligentia* — not to bestow them.

It is impossible to give the measure of culpable negligence for all cases, as the degree of care required depends upon the subjects to which it is to be applied. *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278 ; s. c., 19 Am. Rep, 181. What would be slight neglect in the care of a quantity of iron might be gross neglect in the care of a jewel. What would be slight neglect in the care exercised in the affairs of a turnpike corporation, or even of a manufacturing corporation, might be gross neglect in the care exercised in the management of a savings bank intrusted with the savings of a multitude of poor people, depending for its life upon credit and liable to be wrecked by the breath of suspicion. There is a classification of negligence to be found in the books, not always of practical value and yet sometimes serviceable, into slight negligence, gross negligence, and that degree of negligence intermediate the two, attributed to the absence of ordinary care ; and the claim on behalf of these trustees is that they can only be held responsible in this action in consequence of gross negligence, according to this classification. If gross negligence be taken according to its ordinary meaning — as something nearly approaching fraud or bad faith — I cannot yield to this claim ; and if there are any authorities upholding the claim, I emphatically dissent from them.

It seems to me that it would be a monstrous proposition to hold that trustees, intrusted with the management of the property, interests and business of other people, who divest themselves of the management and confide in them, are bound to give only slight care to the duties of their trust, and are liable only in case of gross inattention and negligence ; and I have found no authority fully upholding such a proposition. It is true that authorities are found which hold that trustees are liable only for *crassa negligentia*, which literally means gross negligence ; but that phrase has been defined to mean the absence of ordinary care and diligence adequate to the

Hun v. Cary.

particular case. In *Scott v. De Peyster*, 1 Edw. Ch. 513, 543,—a case much cited—the learned vice-chancellor said: “I think the question in all such cases should and must necessarily be, whether they (directors) have omitted that care which men of common prudence take of their own concerns. To require more, would be adopting too rigid a rule and rendering them liable for slight neglect; while to require less, would be relaxing too much the obligation which binds them to vigilance and attention in regard to the interests of those confided to their care, and expose them to liability for gross neglect only—which is very little short of fraud itself.” In *Spring’s Appeal*, 71 Penn. St. 11; s. c., 10 Am. Rep. 684, Judge SHARSWOOD said: “They (directors) can only be regarded as mandataries—persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more.” In *Hodges v. New England Screw Co.*, 1 R. I. 312, JENCKES, J., said: “The sole question is whether the directors have or have not bestowed proper diligence. They are liable only for ordinary care; such care as prudent men take in their own affairs.” And in the same case, AXES, J., said: “They should not therefore be liable for innocent mistakes, unintentional negligence, honest errors of judgment, but only for willful fraud or neglect, and want of ordinary knowledge and care.” The same case came again under consideration in 3 R. I. 9, and GREEN, C. J., said: “We think a board of directors, acting in good faith and with reasonable care and diligence, who nevertheless fall into a mistake, either as to law or fact, are not liable for the consequences of such mistake.” In the case of *Liquidators of Western Bank v. Douglas*, 11 Sess. Cas. (3d series), 112 (Scotch), it is said: “Whatever the duties (of directors) are, they must be discharged with fidelity and conscience, and with ordinary and reasonable care. It is not necessary that I should attempt to define where excusable remissness ends and gross negligence begins. That must depend to a large extent on the circumstances. It is enough to say that gross negligence in the performance of such a duty, the want of reasonable and ordinary fidelity and care, will impose liability for loss thereby occasioned.” In *Charitable Corporation v. Sutton*, 2 Atk. 405, Lord Chancellor HARDWICKE said, that a person who accepted the office of director of a corporation “is obliged to execute it with fidelity and reasonable diligence,” although he acts without compensation. In *Litchfield v. White*, 3 Sandf. 545, SAND-

FORD, J., said : " In general, a trustee is bound to manage and employ the trust property for the benefit of the *cestui que trust* with the care and diligence of a provident owner. Consequently he is liable for every loss sustained by reason of his negligence, want of caution, or mistake, as well as positive misconduct."

In *Spring's Appeal*, Judge SHARSWOOD said that directors "are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they were honest, and provided they are fairly within the scope of the powers and discretion confided to the managing body." As I understand this language, I cannot assent to it as properly defining to any extent the nature of a director's responsibility. Like a mandatary, to whom he has been likened, he is bound not only to exercise proper care and diligence, but ordinary skill and judgment. As he is bound to exercise ordinary skill and judgment, he cannot set up that he did not possess them. When damage is caused by his want of judgment, he cannot excuse himself by alleging his gross ignorance. One who voluntarily takes the position of director, and invites confidence in that relation, undertakes, like a mandatary, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. Story on Bailments, § 182. Such is the rule applicable to public officers, to professional men and to mechanics, and such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge ; and it matters not that the service is to be rendered gratuitously. These defendants voluntarily took the position of trustees of the bank. They invited depositors to confide to them their savings, and to intrust the safe-keeping and management of them to their skill and prudence. They undertook not only that they would discharge their duties with proper care, but that they would exercise the ordinary skill and judgment requisite for the discharge of their delicate trust.

Enough has now been said to show what measure of diligence, skill and prudence the law exacts from managers and directors of corporations ; and we are now prepared to examine the facts of this case, for the purpose of seeing if these trustees fell short of this measure in the matters alleged in the complaint.

This bank was incorporated by the act chapter 467 of the Laws

Hun v. Cary.

of 1867, and it commenced business in the spring of that year, in a hired building, on the east side of Third avenue, in the city of New York. It remained there for several years, and then removed to the west side of the avenue, between Forty-fifth and Forty-sixth streets, where it occupied hired rooms until near the time of its failure in the fall of 1875. During the whole time the deposits averaged only about \$70,000. In 1867, the income of the bank was \$942.12, and the expenses, including amounts paid for safe, fixtures, charter, current expenses and interest to depositors, were \$5,571.34. In 1868, the income was \$5,471.43, and the expenses, including interest to depositors, \$5,719.43. In 1869, the income was \$3,918.27, and the expenses and interest paid \$5,346.05. In 1870 the income was \$5,784.09, and expenses and interest \$7,040.22. In 1871 the income was \$13,551.14, which included a bonus of \$4,000, or \$6,000 obtained upon the purchase of a mortgage of \$40,000, which mortgage was again sold in 1874 at a discount of \$2,000, and the expenses, including interest paid, were \$9,124.05. In 1872 the income was \$5,100.51, and the expenses, including interest paid, were \$7,212.49. Down to the 1st day of January, 1873, therefore, the total expenses, including interest paid, were \$5,046 more than the income. To this sum should be added \$2,000, deducted on the sale of the large mortgage in 1874, which was purchased at the large discount in 1871, as above mentioned, and yet entered in the assets at its face. From this apparent deficiency should be deducted the value of the safe and furniture of the bank, from which the receiver subsequently realized \$500. At the same date, the amount due to over one thousand depositors was about \$70,000, and the assets of the bank consisted of about \$13,000 in cash and the balance mostly of mortgages upon real estate.

While the bank was in this condition, with a lease of the rooms then occupied by it expiring May 1, 1874, the project of purchasing a lot and erecting a banking-house thereon began to be talked of among the trustees. The only reason put on record in the minutes of the meetings held by the trustees for procuring a new banking-house was to better the financial condition of the bank. In February, 1873, at a meeting of the trustees, a committee was appointed "on site for new building;" and in March the committee entered into contract for the purchase of a plot of land, consisting of four lots, on the corner of Forty-eighth street and Third avenue, for the sum of \$74,500; of which \$1,000 was to be paid down, \$9,000 on

the first day of May then next, and \$64,000 to be secured by a mortgage, payable on or before May 1, 1875, with interest from May 1, 1873, at seven per cent ; and there was an agreement that payment of the principal sum secured by the mortgage might be extended to May 1, 1877, provided a building should, without unavoidable delay, be erected upon the corner lot, worth not less than \$25,000. This contract was reported by the committee to the trustees, at a meeting held April 7th. On the 1st day of May, 1873, the real estate was conveyed and the cash payment was made, and four separate mortgages were executed to secure the balance, one upon each lot. The mortgage upon the lot upon which the bank building was afterward erected was for \$30,500. At the same time the bank became obligated to build upon that lot a building covering its whole front, 25 feet, and 60 feet deep, and not less than five stories high, and have the same inclosed by the first day of November then next. Upon that lot the bank proceeded, in the spring of 1875, to erect a building covering the whole front, and 76 feet deep, and five stories high, at an expense of about \$27,000. And the building was nearly completed when the receiver of the bank was appointed, in November of that year. The three lots not needed for the building were disposed of, as we may assume without any loss, leaving the corner lot used for the building to cost the bank \$29,250 ; and we may assume that that was then the fair value of the lot. This case may then be treated as if these trustees had purchased the corner lot at \$29,250, and bound themselves to erect thereon a building costing \$27,000. When the receiver was appointed, that lot and building, and other assets which produced less than \$1,000, constituted the whole property of the bank ; and subsequently the lot and building were swept away by a mortgage foreclosure, and this action was brought to recover the damages caused to the bank by the alleged improper investment of its funds, as above stated, in the lot upon which the building was erected.

At the time of the purchase of the lot, the bank was substantially insolvent. If it had gone into liquidation, its assets would have fallen several thousand dollars short of discharging its liabilities, and this state of things was known to the trustees. It had been in existence about six years, doing a losing business. The amount of its deposits, which its managers had not been able to increase, shows that the enterprise was an abortion from the beginning, either because

Hun v. Cary.

it lacked public confidence, or was not needed in the place where it was located. It had changed its location once without any benefit. It had on hand but about \$13,000 in cash, of which \$10,000 were taken to make the first payments. The balance of its assets was mostly in mortgages not readily convertible. One was a mortgage for \$40,000, which had been purchased at a large discount, and we may infer that it was not very salable, as the trustees resolved to sell it as early as May, 1873, and in August, 1873, authorized it to be sold at a discount of not more than \$2,500, and yet it was not sold until 1874. In this condition of things the trustees made the purchase complained of, under an obligation to place on the lot an expensive banking-house. Whether, under the circumstances, the purchase was such as the trustees, in the exercise of ordinary prudence, skill and care, could make; or whether the act of purchase was reckless, rash, extravagant, showing a want of ordinary prudence, skill and care, were questions for the jury. It is not disputed, that under the charter of this bank, as amended in 1868 (chap. 294), it had the power to purchase a lot for a banking-house "requisite for the transaction of its business." That was a power, like every other possessed by the bank, to be exercised with prudence and care. Situated as this moribund institution was, was it a prudent and reasonable thing to do, to invest nearly half of all the trust funds in this expensive lot, with an obligation to take most of the balance to erect thereon an extravagant building? The trustees were urged on by no real necessity. They had hired rooms where they could have remained; or if those rooms were not adequate for their small business, we may assume that others could have been hired. They put forward the claim upon the trial that the rooms they then occupied were not safe. That may have been a good reason for making them more secure, or for getting other rooms, but not for the extravagance in which they indulged. It is inferable however that the principal motive which influenced the trustees to make the change of location was to improve the financial condition of the bank by increasing its deposits. Their project was to buy this corner lot and erect thereon an imposing edifice, to inspire confidence, attract attention, and thus draw deposits. It was intended as a sort of advertisement of the bank, a very expensive one indeed. Savings banks are not organized as business enterprises. They have no stockholders, and are not to engage in speculation or money-making in a business sense. They are simply

to take the deposits, usually small, which are offered, aggregate them, and keep and invest them safely, paying such interest to the depositors as is thus made, after deducting expenses, and paying the principal upon demand. It is not legitimate for the trustees of such a bank to seek deposits at the expense of present depositors. It is their business to take deposits when offered. It was not proper for these trustees—or at least the jury may have found that it was not—to take the money then on deposit and invest it in a banking-house merely for the purpose of drawing other deposits. In making this investment, the interests of the depositors, whose money was taken, can scarcely be said to have been consulted.

It matters not that the trustees purchased this lot for no more than a fair value, and that the loss was occasioned by the subsequent general decline in the value of real estate. They had no right to expose their bank to the hazard of such a decline. If the purchase was an improper one when made, it matters not that the loss came from the unavoidable fall in the value of the real estate purchased. The jury may have found that it was grossly careless for the trustees to lock up the funds in their charge in such an investment, where they could not be reached in any emergency which was likely to arise in the affairs of the crippled bank.

We conclude therefore that the evidence justified a finding by the jury that this was not a case of mere error or mistake of judgment on the part of the trustees, but that it was a case of improvidence, of reckless, unreasonable extravagance, in which the trustees failed in that measure of reasonable prudence, care and skill which the law requires.

[Minor points omitted.]

I conclude therefore that the judgment appealed from should be affirmed.

Judgment affirmed and appeal from order dismissed.

All concur.

Reynolds v. Robinson.

REYNOLDS V. ROBINSON.

(62 N. Y. 103.)

Will — evidence — legacy — debt of testator to legatee.

A testator was indebted to his adopted daughter in an unliquidated amount for services. By his will he provided legacies for her and her daughter "after payment of debts," to a less amount than the value of the services. *Held*, that evidence was inadmissible to show his declarations that the legacies were intended as compensation for the services, and that there was no presumption to that effect.

ACTION for services. The opinion states the case. The plaintiff had judgment below.

Esek Cowen, for appellants.

A. D. Wait, for respondent.

ANDREWS, J. In the opinion of the court on the former appeal, 64 N. Y. 589, it was declared that when an agreement is made between two parties, compensation for services rendered by one to the other, shall be made by a provision in the will of the latter, and a provision is made sufficient only to compensate in part for the services, the party rendering them has, after the death of the other, a cause of action against his representatives for the balance remaining due over and above the testamentary provision. The legacy or provision made by the will in such a case is to be taken and applied by the creditor in part payment of the debt. The statement of the rule upon this subject in the opinion referred to was not essential to the decision, as the judgment was reversed for error in the admission of evidence in relation to another matter, but we think that the general principle announced is well founded in reason and authority, and is to be applied, except in cases where the language of the will excludes the inference that the testator intended that the testamentary gift should go in reduction of the debt.

In this case the defendants' testator gave by his will to the plaintiff's wife, who was the testator's adopted daughter, his household furniture, and a pecuniary legacy of \$1,500. Also, to plaintiff's daughter, \$500. The action is brought for the services of the plaintiff's wife, rendered to the testator after her marriage, and the

appellants claim that they were rendered upon an agreement or understanding between the testator and the plaintiff that compensation should be made therefor by gifts from the testator to his daughter and her husband in his life-time and by legacies in his will. The referee however found that the services were rendered at the request of the testator, and upon his express promise to pay their value, and refused to find as requested by the appellants that they were rendered upon the agreement or understanding claimed by them, and directed judgment for the value of the services, making no allowance and giving no credit for the legacies given by the will.

[Omitting question of fact.]

The only material question of law presented by the record arises upon the exception to the exclusion by the referee of the offer of the appellants to show by the scrivener who drew the will, that at the time it was drawn the testator stated that he had promised Mrs. Reynolds to pay her for her services by will, and directed the insertion of the legacies to Mrs. Reynolds and her daughter, giving as a reason for the instruction that it was to comply with such promise. The offer in substance was to show by the declarations of the testator, made when the will was drawn, that the legacies were intended as a payment for the services in question.

The general rule is that declarations of a testator before, contemporaneously with, or after the making of a will, are inadmissible to affect its construction. 1 Redf. on Wills, 538. In *Mann v. Executors of Mann*, 1 Johns. Ch. 231, Chancellor KENT said that the rule was well settled that parol evidence cannot be admitted to supply or contradict, enlarge or vary the words of a will, nor to explain the intention of the testator, except in two cases, viz.: when there is a latent ambiguity, arising *dehors* the will as to the person or subject meant to be described, or to rebut a resulting trust. A legacy implies a bounty and not a payment, and to permit extrinsic evidence of the declaration of the testator to change the material import of the donative words would be to contradict by oral evidence the legal effect of the written instrument, and would violate the policy of the Statute of Wills, "for then," as Lord Chancellor TALBOT said, in *Fowler v. Fowler*, 3 P. Wms. 353, "the witnesses, and not the testator, would make the will." The law raises in certain cases presumptions against the apparent intention of the testator, and one of these presumptions is, that a legacy from a

Reynolds v. Robinson.

debtor to a creditor of a sum as great or greater than the debt was intended as a satisfaction. *Chancey's case*, 1 P. Wms. 408. So also, when two legacies substantially alike are given by the same will, a presumption arises that only one legacy was intended. *Hooley v. Patton*, 1 Bro. C. C. 390. The courts in these cases have permitted parol evidence to be given in support of the apparent intention of the testator, and to rebut the presumption which the law raises, "for the effect of such testimony is not to show that the testator did not mean what he has said, but on the contrary, to prove what he has expressed." Sir JOHN LEACH, in *Hurst v. Beach*, 5 Madd. 351. See also, *Trimmer v. Bayne*, 7 Ves. 508. On the other hand, the recent and best considered authorities seem to establish the rule that parol evidence of the intention of the testator is not admissible to fortify a legal presumption raised against the apparent intention of the testator, except in answer to evidence impeaching it, or to create a presumption contrary to the apparent intention, when no such presumption is raised by law. *Osborne v. Duke of Leeds*, 5 Ves. 369; *Hurst v. Beach*, 5 Madd. 351; *Hall v. Hill*, 1 Dr. & War. 94; 1 Redf. on Wills, 646, and cases cited. In this case no presumption arises that the legacies to Mrs. Reynolds and her daughter were intended as a satisfaction of the debt owing by the testator to the plaintiff, for several reasons: First, the legacies are given "after payment of debts," second, they were of less amount than the debt; third, the debt was unliquidated; fourth, the legacies are not given to the creditor but to a third person. *Boughton v. Flint*, 74 N. Y. 476; *Cranmer's case*, 2 Salk. 508; *Graham v. Graham*, 1 Ves. Sr. 263; *Atkinson v. Webb*, 2 Vern. 478; *Williams v. Crary*, 5 Cow. 368; s. c., 4 Wend. 449; *Hall v. Hill*, 1 Dr. & War. 94; *Clarke v. Bogardus*, 12 Wend. 67.

Each of the circumstances mentioned, according to the authorities cited, prevents the presumption that the legacies were intended as a satisfaction. In *Eaton v. Benton*, 2 Hill, 576, where the declarations of a testator had been admitted for the purpose of showing that he intended that a devise made in his will should satisfy a debt owing by him to his devisee, BRONSON, J., expressed great doubt as to the competency of the evidence, but the point was left undecided. The case of *Phillips v. McCombs*, 53 N. Y. 494, is a direct adjudication upon the general question, but the reasons for the decision are not stated in the opinion of the court. Our con-

In Matter of Eldridge.

clusion is that both upon principle and authority the evidence offered was properly rejected.

The case is not one of a transaction *inter vivos* not evidenced by writing, which might be either a gift or a payment depending upon intention, in which case the declaration of a party accompanying the act is admissible to explain and characterize it.

These views lead to an affirmance of the judgment.

Judgment affirmed.

All concur, except FINCH, J., absent at argument.

IN MATTER OF ELDRIDGE.

(82 N. Y. 161.)

Attorney — disbarring — evidence — what is cause for removal.

In proceedings to disbar an attorney where the charges are denied, the common-law rules of evidence apply. The accused is not to be tried upon affidavits, but is entitled to confront the witnesses and subject them to cross-examination and to invoke the well-settled rules of evidence.

An attorney in proceedings for the probate of a will, who had taken out a commission for the examination of a witness, prepared answers for such witness to the interrogatories and cross-interrogatories, furnished them to the witness who had received various sums of money from him, read a part of the answers to the commissioner and left the rest for the witness to repeat, and thus got the answers before the surrogate as honest testimony. *Held*, sufficient to authorize an order disbarring the attorney even though the answers were not shown to be false, and it appeared that the attorney believed them to be true.

A PPEAL from an order disbarring an attorney. The opinion states the case.

Samuel Hand, for appellant, cited *Commercial Bk. v. Union Bk.*, 11 N. Y. 210; 3 Wall., Jr., C. C., 194; *Hurst v. Larpin*, 21 Iowa, 484; *Fisk v. Funk*, 12 Wis.; *Goodrich v. Goodrich*, 44 Ala. 670; 37 Conn. 216; *The "Norway,"* 2 Ben. C. C. 121.

Lewis L. Delafield, for respondent.

In Matter of Eldridge.

FINCH, J. The questions raised on this appeal involve the professional character of a member of the bar, and the propriety of the decision of the General Term which has suspended him from the office and the duties of an attorney for three years. While the discipline may seem light, it is yet severe, for it is the public and grave conclusion of the court, deliberately spread upon the record, that the appellant has been guilty of conduct unbecoming his profession, and deserving judicial censure. The struggle to reverse this determination, and defend the reputation assailed, awakens our sympathy, and demands of us patient care and consideration to prevent even a trace of injustice, while at the same time, our duty to an honorable profession, the need of preserving unsullied that high standard of truth and purity by which alone an officer of justice should be measured, demands of us a cold and deliberate scrutiny, and firmness in declaring its result. We have therefore examined minutely all the voluminous papers submitted on the argument, and considered carefully the able discussion at the bar, and the full and thoroughly prepared briefs of the respective counsel, desiring to omit no labor necessary to a correct conclusion.

[Minor inquiry omitted.]

As we approach the facts of the case at bar another preliminary question is to be considered, raised this time on behalf of the appellant. He insists that the affidavits and papers upon which was founded the order to show cause, and which were transmitted to the referee appointed to determine the issues raised, were not evidence upon those issues, and could have no other proper office or effect than that of pleadings or statements of the charges or accusations relied upon. In reply, the broad doctrine is asserted that these affidavits were evidence, that the common-law rules did not apply to the proceeding, that every thing was admissible, and its effect only the subject of consideration. The language of a previous decision of this court, that "the common-law rules of evidence do not apply to proceedings of this character," was pressed upon our attention. *In re Percy*, 36 N. Y. 651. The doctrine in that case was correct to the extent of its application. It related only to the kind and character of evidence presented to the court for the purpose of originating its action. For that purpose affidavits were properly held sufficient, and also the verified minutes of a trial at the Circuit. And it was only with reference to this preliminary step, the evidence necessary to justify action by the court,

that the language cited was used. The opinion in that case goes on to declare that "the court may and ought to cause the charges to be preferred, whenever satisfied from what has occurred in its presence, or from any satisfactory proof that a case exists where the public good and ends of justice call for it. Upon the return of the order the court proceeded *properly* to investigate the charges." The decision therefore falls very far short of holding that upon the trial of issues involving professional misconduct, and the right of an attorney to retain his office and its privileges, the common-law rules of evidence may be disregarded. We should be slow to follow such an authority, if it existed. The issue is vital to the party assailed. An adverse decision dooms him always to disgrace, and often to poverty and want. His professional life is full of adversaries. Always in front of him there is an antagonist, sometimes angry and occasionally bitter and venomous. His duties are delicate and responsible, and easily subject to misconstruction. To say that when he denies the charges brought against him he may be tried without the rights and the safeguards which belong to the humblest criminal, would be to adopt a dangerous rule, and one without reason or justification. The question is important and it is best that we decide it.

On the application addressed in the first instance to the court, as the mode of arousing its attention and setting it in motion, affidavits, minutes of testimony, any thing which furnishes needful information, may be used as the basis upon which to found an order to show cause. Upon the return of that order the accused is heard. He may confess, he may explain, he may deny. If he confess, the court may at once render its judgment. If he explain, the court may deem the explanation sufficient, or the reverse. But if he meets accusation with denial, the issue thus raised is to be tried, summarily it is true, by the court itself, or by a referee, but nevertheless to be tried, and on that trial the accused is not to be buried under affidavits or swamped with hearsay, but is entitled to confront the witnesses, to subject them to cross-examination, and to invoke the protection of wise and settled rules of evidence. In adopting this conclusion we only secure to the members of the bar the common rights and ordinary privileges of the citizen.

It remains to consider whether the evidence adduced before the referee justified the decision which suspended this appellant from the practice of his profession. A portion of the charges against

In Matter of Eldridge.

him were very grave. They were nothing less than perjury and subornation of perjury. A will of his wife's father had practically disinherited her. No fault or misconduct of hers explained or palliated the act, and it could only be accounted for by the testator's anger against her husband, or the persistent and paramount influence of the other children and those connected with them. On this latter ground, the appellant, in the name of his wife, and acting at first as her proctor, and all the time as her counsel, resisted the probate of the will. Upon the hearing he introduced in evidence the testimony of three witnesses, Ardies, Wheeler, and Mason, taken out of the State, and by commission. The answers they gave were very minute in their details, and unusually long and full, and tended to show undue influence operating upon the mind of the testator, and producing the result accomplished by the will. At the conclusion of the hearing probate was refused by the surrogate. In his opinion, he gives very slight weight to the evidence taken by commission and rests his conclusion mainly upon the other evidence in the case. Not long after, the defeated parties opened a new attack. They presented to the surrogate a mass of affidavits which in their printed form make a book of 285 pages, tending to show that the evidence taken on commission was false and a fraud upon the surrogate, and that the husband and proctor of the contestant was the author and contriver of the wrong. Upon these affidavits, the surrogate made an order on the 11th of March requiring the contestant to show cause before him on the 29th of March why the decree rejecting the will should not be opened and vacated, and the evidence taken on commission stricken out and expunged on the ground that it was procured by fraud, perjury and subornation of perjury. Eldridge and his wife seem to have been stunned by the suddenness and magnitude of the attack, which was largely based upon affidavits of Ardies and Wheeler, confessing with shameless effrontery their own perjury and wickedness, and pointing to Eldridge as the active cause, and upon circumstances tending to show that the witness Mason was a myth, and was personified before the commissioner by one Byrnes. A settlement of the controversy over the will followed, apparently arranged by counsel, in which Eldridge took no part, except that of silence, through which the decree rejecting the will was vacated without opposition, the evidence taken on commission stricken from the record, the will admitted to probate, and soon after a provision made for the

In Matter of Eldridge

contestant in excess of the testator's bequest, and to some extent recognizing her equitable claims. This peaceful settlement however, was soon followed by the presentation of the affidavits and papers used before the surrogate to the General Term, which after notice to Eldridge, and consideration of his answer denying the charges, sent the case to a referee. The latter held, and the majority of the General Term concur, that the charges of perjury and subornation of perjury, and that of imposing a false witness as being Peter Mason upon the commissioner were not established. That conclusion it is not necessary to disturb. But the referee finds, and the General Term concur, that in respect to the deposition of Wheeler, the conduct of the appellant was such as justly to deserve the censure and discipline of the court. The facts in this respect do not depend upon affidavits or evidence of a character open to criticism. They rest mainly upon the admissions of Eldridge himself. Regarding the affidavits presented to the court substantially as a pleading, they nevertheless constituted an accusation which called upon Eldridge for an answer. Upon the admissions of that answer the case against him stands. Wheeler alleges in his affidavits that Eldridge wrote out in detail answers to be given by the witness to the interrogatories and cross-interrogatories of the commission; that when the deposition was taken Eldridge was personally present and himself read to the commissioner the answers he had prepared, and then left with the witness, written out in full, the answers to the cross-interrogatories, which the latter read from the memorandum to the commissioner. Wheeler further charges that his testimony was both preceded and followed by payments of money by Eldridge, and produces his letters suggesting a destruction of their correspondence, and begging for a return of the memoranda used at the taking of the deposition. Such original memoranda, alleged to be in the handwriting of copyists employed by Eldridge, were attached to Wheeler's affidavit. In his answer Eldridge admits that he furnished the memoranda for the deposition. He does not deny the authenticity of the prepared answers produced by Wheeler. He admits, and to some extent palliates and excuses the payments of money. He does not dispute the correspondence produced. He does not deny reading the answers for Wheeler to the commissioner in Philadelphia, and leaving those framed for the cross-interrogatories to be read by the witness. His explanations of these things do not satisfy us. The

In Matter of Eldridge.

memorandum made by Eldridge and produced by Wheeler of answers to cross-interrogatories is a very long and carefully prepared document. It occupies in print about eighteen compact pages. On comparing it with the deposition read before the surrogate it is found to be absolutely identical. Laying aside then all question of the truth or falsity of the answers, discarding every thing dependent upon Wheeler alone as unworthy of credit, the fact yet remains that an attorney of the court, having taken out a commission for the examination of a witness, writes out what, when printed, are twenty-six pages of answers to interrogatories, and eighteen pages of answers to cross-interrogatories, furnished them to the witness, who has already drawn upon him for various sums of money, reads a part of the answers to the commissioner, and leaves the rest for the witness to repeat, and so practically puts his own words, his own ideas, his own facts into Wheeler's mouth, and gets them before the surrogate disguised as honest testimony. Such conduct is inexcusable. The coloring sought to be given it by Eldridge that he merely meant to refresh the memory of the witness is not justified by the facts. He furnished answers, not notes. He controlled and mastered the memory of the witness; not merely refreshed it. The witness did not answer at all. Eldridge answered for him. We get neither the language nor the memory of the witness; we get only that of his teacher. Practically the examination was merely an affidavit drawn by Eldridge and sworn to by Wheeler. In its true character it was not admissible before the surrogate. When therefore it was disguised in the shape of testimony and the form of an examination, and so received into the case, a fraud was committed on the surrogate, and the author of it was Eldridge. Grant that the answers are not shown to be false, and that Eldridge believed them to be true; yet he corrupts justice at the fountain by dictating the evidence of the witness. Upon the trial of an issue in open court a question merely leading is excluded. The law so carefully guards the independent and unwarped testimony of a witness that it will not permit even by the form of a question, the suggestion of its answer. Yet here the answers to thirty-three direct interrogatories, and forty-one, cross-interrogatories are actually written out by the attorney for the use of the witness, and so imported into the case.

It is intimated on his behalf that he did not go beyond the custom of the bar. He may have thought so, but is most certainly

mistaken. If that were true it would only make our duty all the more imperative. While a discreet and prudent attorney may very properly ascertain from witnesses in advance of the trial what they in fact do know, and the extent and limitations of their memory, as a guide to his own examinations, he has no right, legal or moral, to go further. His duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know. It is impossible, too, in this case, not to feel the force of other admitted facts. The payments of money by Eldridge to Wheeler, if not bribes, approached nervously near to the line. He, himself, repudiating such purpose, seems fearful of that construction. His anxiety to get back his memoranda, and to have his correspondence destroyed, indicates his own inner consciousness of conduct open to suspicion. It is impossible not to feel sympathy for him in his struggle, and yet our plain duty is to shrink from no conclusion which the purity and integrity of the profession demand.

The order of the General Term should be affirmed.

Order affirmed.

All concur.

CRONIN V. PEOPLE.

(82 N. Y. 818.)

Statutory construction—municipal power to regulate slaughter-houses—prohibition.

A power conferred upon a city in its charter to "regulate the erection, use and continuance of slaughter-houses" within the city, includes the power of total prohibition within specified limits or localities.

INDICTMENT for nuisance. The opinion states the case. Demurrer to indictment was overruled below.

N. P. Hinman, for plaintiff in error.

A. J. Colvin, for defendant in error.

FINCH, J. The plaintiff in error was indicted in the Court of Sessions of the county of Albany for slaughtering cattle in violation

Cronin v. People.

of an ordinance of the common council of that city, which forbids such act within certain prescribed limits, specifically named and described, and directs in the interest of health and cleanliness the manner of conducting such business in the localities from which it is not excluded. Penalties are imposed by the ordinance for its violation, which may be recovered in a civil action, or by prosecution as for a criminal offense.

The legislature in 1871 made such violation of a city ordinance a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court. Laws 1871, ch. 536, title 15, § 1. The accused demurred to the indictment, and raises here, in support of his demurrer, the single point that in passing the ordinance in question the common council exceeded its powers, and the ordinance so passed is inoperative and void. The power of the legislature to confer authority for such municipal legislation is not assailed, but the claim that it has actually done so is strenuously denied.

The argument on behalf of the city is that the power to pass such ordinance was incidental to it as a municipal corporation, and resulted from its creation as such, without dependence upon particular words; that it was embraced in the powers granted by the Dongan charter of July 22, 1686, and which were reserved to the city by the act of 1842; and was specially conferred by the amended charter of 1870. Laws of 1870, title 3, § 12, subd. 14.

The last-named act authorizes the common council of Albany to enact ordinances with penalties not exceeding \$100 in the matters and for the purposes thereafter named; and among these purposes is one contained in subdivision 14, the language of which is as follows, viz.: "to regulate the erection, use and continuance of slaughter-houses."

The counsel for the defendant contends that the power thus conferred upon the common council does not justify the ordinance for the violation of which the prisoner was indicted, and his argument is that the clause referred to is a clear recognition of the right to erect, use and continue slaughter-houses within the city and everywhere and anywhere within its limits, and that therefore the authority to regulate them cannot be construed to permit a total prohibition in particular areas or localities.

We do not think the reasoning is sound. The statute recognizes the fact that slaughter-houses exist in the city rather than the right to erect them, and recognizing the fact gives to the common coun-

cil the power to regulate them. The use of the word "regulate" in the statute is not confined merely to the manner in which the business of slaughtering animals is carried on. To regulate implies a power of restriction and restraint, and is applied in the charter not merely to the "use" of slaughter-houses, which would relate to the manner of conducting the business, but also to their "erection" on the one hand and their "continuance" on the other; so that their "erection" in the first instance, and then the mode and manner of their "use" after they are built, and lastly their "continuance," are placed under the regulating power of the municipal authority. It would be a very narrow and technical construction to say that a power to regulate the erection of a slaughter-house is exhausted in prescribing the form or material of its erection and has no reference to its locality. And the construction wholly fails when applied to the "continuance" of such a structure and the business carried on within it. How is it possible to regulate its continuance except by limiting and restricting that continuance, which again can only be done by prohibiting its continued existence. It is the plain purpose of the statute to give to the common council the right to fix and determine the limits and localities within which new slaughter-houses may be erected and the areas from which they shall be excluded; to direct and control the mode and manner of using those so erected and those already existing, as they may deem the health and cleanliness of the city require; and to prohibit their continuance whenever and wherever they become sources of danger to the health or comfort of the community.

The counsel argues that this construction may result in a total prohibition; that if the municipal control can exclude slaughter-houses from the area already named in the ordinance, it can steadily increase and enlarge such area until the business is driven wholly from the city. That does not necessarily follow. It will be soon enough to decide that question when it arises. It is not yet here. We are not to presume that the common council will abuse the authority intrusted to them, or fail to recognize the absolute need of the business to the necessities of the community, while at the same time they feel their responsibility for the health and comfort of the people. It is enough to say for the present that their action is clearly within the authority of the charter.

Our attention is called to other paragraphs under section 12 as

Cronin v. People.

tending to throw light upon the meaning of the word "regulate." The suggestion is, that where authority to prohibit is intended, some stronger word than "regulate" is used, indicating the severer restriction. The language of legislative enactments is not always rigidly precise and accurate, and an argument drawn from the use of specific words is often dangerous; yet in the present case, the terms of the subdivisions referred to favor rather than oppose the meaning we attach to the word in question. As a general rule, with perhaps occasional exceptions, through all the paragraphs of the section where some act or thing is not to be permitted at all, anywhere or in any locality, a more restrictive word than "regulate" is used; as, "to prevent and remove" obstructions in the streets; where the act or thing is such as may be permitted under proper restraint, at convenient times, in suitable localities, the word "regulate" is used; and where the act is one which it may be wise either to permit under appropriate restraints, or to wholly prohibit, the two words are used "to regulate or prevent;" and where a more general and undefined power is intended, involving various details, the phrase adopted is "in relation to." We see nothing therefore in the language of the other subdivisions to change our conclusion that an ordinance which excludes from a specific place or locality the business of slaughtering cattle is a regulation of that business, and therefore within the power conferred upon the common council by the provisions under discussion. Indeed the precise point was long ago adjudged. In *Village of Buffalo v. Webster*, 10 Wend. 100, where a similar ordinance was assailed as in restraint of trade, the court held that an ordinance providing "that meat shall not be sold in a particular place is good, not being a restraint of the right to sell meat but a *regulation* of that right."

The same authority disposes of the objection that the ordinance in question is void as being in restraint of trade, following, in that respect, still older cases, *Bush v. Seabury*, 8 Johns. 418; *Pierce v. Bartrum*, Cowp. 269, and justifying the principle of the later authorities, in which the exercise of such powers by boards of health has been steadily sustained. *Metropolitan Board of Health v. Heister*, 37 N. Y. 662; *Polinsky v. People*, 73 id. 65.

If we correctly understand the counsel for the appellant, he also claims that the ordinance is void, because it punishes the prohibited acts "without pretense, or any form of proof that they were

 People ex rel. Larrabee v. Mulholland.

injurious to the well-being of the town, or that prudence required its passage." The answer is that neither in the ordinance itself, nor in the indictment founded upon it, is it necessary to allege or explain the reason for its enactment or the exigency out of which it grew. It is of the nature of legislative bodies to judge for themselves, and the fact, and the exercise of that judgment, is to be implied from the law itself. *Stuyvesant v. Mayor of New York*, 7 Cow. 606; *Martin v. Mott*, 12 Wheat. 19; *Rector, etc., of Trinity v. Higgins*, 4 Rob. 1.

We do not see therefore that any error was committed in the court below.

The order should be affirmed and the case remanded for the proper sentence to the Court of Sessions of the county of Albany.

Ordered accordingly.

All concur.

 PEOPLE EX REL. LARRABEE V. MULHOLLAND.

(88 N. Y. 324.)

Municipal corporation — power to regulate peddling of milk.

A city passed an ordinance authorizing the mayor to grant licenses "to such persons as in his judgment shall appear proper and best calculated to secure to the inhabitants of the city pure and wholesome milk," and prohibiting the sale of milk by any others in the city, and making unauthorized sale a misdemeanor. *Held*, valid.*

CONVICTION of misdemeanor. The opinion states the point

D. Pratt, for appellant.

Martin A. Knapp, for respondent.

Per Curiam. The appellant makes two points why the city ordinance is not effectual against the association of which the relator was a servant.

One, that the whole purpose of it seems to be to impose a tax upon the milk dealers of the city and especially upon the association.

* See *Ward v. Mayor, etc., of Greenville* (8 Baxt. 228), 35 Am. Rep. 700, and note 702; *Muhlenbrinck v. Commissioners* (13 Vroom, 364), 36 Am. Rep. 518.

Brush v. Barrett.

We do not agree in this. The purpose of the city ordinance is not to impose a tax, or to raise a revenue for municipal use. The terms of it show that it is not. By it the mayor is to grant license "to such persons as in his judgment shall appear proper and best calculated to secure to the inhabitants of the city pure and wholesome milk." Clearly the object of it is the health and comfort of the citizens, by securing to them a supply of pure and wholesome milk. The license and the fee therefor are a means of regulation and control, and the penalty is a means of enforcing a proper restraint upon the persons by whom milk is offered. Being such, it was within the scope of the general and particular power of the city to make the by-law. See City Charter, Laws of 1857, chap. 63, p. 114; *id.* 111; *City of Brooklyn v. Breslin*, 57 N. Y. 591.

The other point is, that the ordinance is in direct conflict with the privileges granted to that association by its charter.

[Omitting this.]

The judgment should be affirmed.

Judgment affirmed.

All concur, except RAPALLO, J., not voting.

BRUSH V. BARRETT.

(83 N. Y. 400.)

Limitation — check — no funds.

Where the drawer of a check has no funds with the drawee to meet it, the Statute of Limitations begins to run from its date

ACTION on a check. The opinion states the case. The plaintiff had judgment at trial, which was reversed at General Term.

Myron H. Peck, for appellant. The Statute of Limitations was no defense. *Cruger v. Armstrong*, 3 Johns. Cas. 5; 2 Am. Dec. 126; *Murray v. Judah*, 6 Cow. 484; *Harker v. Anderson*, 21 Wend. 372; *Judd v. Smith*, 3 Hun, 190; *Conkling v. Gandall*, 1 Keyes, 228; *Edw. on Bills and Notes*, 596, 398; *Story on Prom. Notes*, 342, 497; *Payne v. Gardiner*, 29 N. Y. 146; *Pardee v. Fish*, 60 *id.* 265; s. c., 19 Am. Rep. 176; *Howell v. Adams*, 68 N. Y. 314; *Cowing v. Alt-*

man, 71 id. 435 ; *Walden v. Crafts*, 2 Abb. 301; *Baird v. Walker*, 12 Barb. 298. No delay on the part of the holder in making presentment will discharge the drawer of a check, unless he is in fact damnified thereby. Dan. on Neg. Inst., § 1589 ; *Little v. Phoenix Bank*, 2 Hill, 425 ; *Mohawk Bank v. Broderick*, 10 Wend. 306 ; *Elling v. Brinkerhoff*, 2 Hall, 463 ; *Purchase v. Mattison*, 6 Due, 589 ; *White v. Ambler*, 8 N. Y. 170 ; 3 Kent Com. 104, n. 2 ; 1 Wait's Actions and Defenses, 505.

L. N. Bangs, respondent.

MILLER, J. This case involves the question whether the Statute of Limitations is a defense to a check, which, for some unexplained reason, has not been presented for payment and payment demanded and refused until ten years after its date. Upon the trial evidence was introduced tending to show that the defendant, the maker, had no funds on deposit in the bank subject to the payment of the check at the time of its date, or at any other time during the period of six years thereafter. At the close of the testimony upon the trial a nonsuit was asked, upon the ground, among others, that there being no funds, the check was due at the time it was delivered and the Statute of Limitations had run against it, which was refused and an exception taken by the defendant to the ruling. The court was also requested to charge the jury that there being no funds the right of action accrued at once, without presentation or notice of non-payment, and the action was barred by the Statute of Limitations. This also was refused and the defendant duly excepted.

If the evidence established that there were no funds in the bank to meet the check when it was drawn, the check was due immediately and the judge was wrong in his refusal to charge the jury as requested. This rule is well established that if the drawer has no funds in the hands of the drawee, an action can be maintained against the former without any presentment or notice of non-payment. *Mohawk Bank v. Broderick*, 10 Wend. 306 ; *Fitch v. Redding*, 4 Sandf. 130 ; *Healy v. Gilman*, 1 Bosw. 235 ; *Johnson v. Bk. of North America*, 5 Robt. 554. As the cause of action was complete when the check was made, and the plaintiff could allege a want of funds as an excuse for non-presentment of the check, and no presentment was required, it is very clear that the statute began to run from its date.

Brush v. Barrett.

It is insisted that the want of funds in the bank is the result of the fraudulent act of the drawer, which operates as a waiver of presentment, and the defendant is estopped from alleging any such fact, and that it is no defense to an action upon the check. We are unable to see upon what ground the doctrine of estoppel can be invoked under the circumstances, and the position taken cannot be upheld. The want of funds is an established fact in the case, which affects the liability of the drawer and relieves the holder from the obligation ordinarily incurred to present the check. It renders it due without presentment and demand; and being due, no reason exists why this fact is not available to the drawer as well as the holder. While the drawer fails to provide funds, the holder neglects to present the check; and both parties are thus in fault. The holder may avail himself of the maker's default by bringing a suit immediately without demand, and if he delays to enforce his claim by action within six years, the drawer may plead the Statute of Limitations as a bar. If the check is due, so that the holder can collect it without delay, it is due as to both parties, and each is entitled to the benefit arising from the facts actually existing. The breach of the contract is the cause of action, and the statute begins to run from the time of such breach, even if there is fraud on the part of the defendant. *East India Co. v. Paul*, 1 Eng. L. & Eq. 44, 49; *Battley v. Faulkner*, 3 B. & Ald. 288; *Whitehouse v. Fellows*, 100 Eng. C. L. 765; *Wilkinson v. Verity*, L. R., 6 C. P. 206, 209. It may also be remarked that the action to recover the amount of the check on the ground of a want of funds rests on contract, and the same measure of damages is recoverable as if the check had been presented for payment and was not paid. The cause of action is the same in each case, and the statute runs equally against any form of action arising from the non-payment of the check.

As the order granting a new trial must be upheld upon the ground already discussed, it is not necessary to consider the question whether the Statute of Limitations runs against the check from the day of its date without regard to the want of funds, and without any presentment and demand of payment.

The order should be affirmed and judgment absolute ordered for the defendant upon the stipulation, with costs.

Order affirmea and judgment accordingly.

All concur.

FOOSE v. Whitmore.

FOOSE v. WHITMORE.

(88 N. Y. 405.)

Will — precatory words.

A testator gave and bequeathed all his property to his wife, "only requesting her, at the close of her life, to make such disposition of the same among my children and grandchildren as shall seem to her good. *Held*, that the gift to the wife was absolute.*

EJECTMENT. The question was of construction of the following words in a will: "I, in order to settle, as far as possible, all my worldly interests, do give and bequeath all my property, real and personal, to my beloved wife Mary, only requesting her, at the close of her life, to make such disposition of the same among my children and grand-children, as shall seem to her good.

E. A. Nash, for appellant.

W. H. Niles, for respondents.

DANFORTH, J. Notwithstanding the well-directed and careful research of the learned counsel for the appellant, no case has been found exactly covering the one before us. We are therefore not embarrassed by authority, for the tendency of modern decisions is not to extend the rule or practice, which, from words of doubtful meaning, deduces or implies a trust. 2 Story Eq. Jur., § 1069; *Lamb v. Eames*, L. R., 10 Eq. Cas. 267; *In re Hutchinson and Tenant*, L. R., 8 Ch. Div. 540. Yet when this doctrine was applied, the object sought for was the intention of the testator, and for this the context of the will was looked at, first, to ascertain his wishes, if any were expressed, and next to see whether he intended to impose an obligation on his legatee to carry them into effect, or having expressed his wishes, he intended to leave it to the legatee to act on them or not in his discretion. Cases illustrating both divisions of this inquiry are collected, and to some extent analyzed by various learned text-writers, and it would be a useless task to reproduce them here. Perry on Trusts, chap. 4, vol. 1; Hill on Trustees, 71-83; 1 Jarm. on Wills, 341. They are however subject

* See *Williams v. Worthington* (49 Md. 572), 38 Am. Rep. 226, and note, 228.

Foose v. Whitmore.

to the rule stated by Lord CRANWORTH, in *Williams v. Williams*, 1 Sim. [N. S.] 358, that "the real question always is whether the wish or desire, or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it however to the party to exercise his own discretion." This rule is applied and illustrated in *Bernard v. Minshull*, Johns. Ch. [Eng.] 276, and in *Howarth v. Dewell*, 6 Jur. [N. S.] 1360, where a devise by a testator of all the residue of his property, real and personal, to his wife, with power to dispose of the same among all his children in her discretion, was held to be an absolute gift to the wife. There are later cases. *In re Hutchinson and Tenant*, L. R., 8 Ch. Div. 540, 1878. Where a testator gave all his property to his wife, "absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so," the learned court said: "Both on principle and in consonance with the most modern authorities, I decide that the widow took absolutely." To the same conclusion we must come in this case. The will is very short, and the language used permits no doubt as to the testator's wishes. He says: "I do give and bequeath all my property, both real and personal, to my beloved wife, Mary." These are plain words, and standing alone would give the plaintiff no ground for contention. The wife would take in fee and absolutely. The learned counsel for the appellant finds qualifying words in the rest of the sentence, viz., "only requesting her, at the close of her life, to make such disposition of the same among my children and grand-children, as shall seem to her good," and claims that what otherwise would be a fee is thus cut down to a life-estate, and a trust created as to the remainder in favor of the testator's children and grand-children. On the other side it is in substance argued that the gift to the widow is absolute, that the words last quoted add a power of disposition which is nugatory, and which does not detract from the previous absolute gift. This conclusion is warranted by the words used. They are not words of obligation, and impose none. They are mere words of suggestion, involving no direction or command. By executing the alleged trust, she would defeat the gift. The plaintiff reads it as if the testator said: "I give you all of my estate, but at the close of your life you are to distribute all of it among my children and my

grand-children," and so the wife would get nothing. The question as an original one seems too plain for argument, and susceptible of one answer only and that in favor of the defendant.

In my opinion the provision is at most a mere recommendation of the children and grand-children to the favorable consideration of the devisee, and does not create a legal obligation of any kind upon her in their favor. Indeed the peculiar and qualified language used, "only requesting," etc., seems also to indicate that the omission to provide for them was deliberate and intentional, and that they may have been so referred to under an impression of the testator, or the writer of the will, that unless in some manner they appeared to be in the mind of the testator at the time of its execution, the will would, as against them, be invalid. Such an impression would be justified by the statutes of some of the States of the Union (*Bancroft v. Ives*, 3 Gray, 367; 3 Redf. on Wills, 297 [ed. of 1869]), and from some one of these, the testator or his scrivener may have gathered it. But for whatever reason inserted, they do not in our opinion create a trust.

The judgment appealed from should be affirmed.

Judgment affirmed.

All concur.

FAULKNER V. HART.

(82 N. Y. 413.)

Carrier — liability as insurer — conflict of laws.

The consignees of goods, residing in Boston, contracted with a transportation company in New York for the carriage of the goods from New York to Boston, and the delivery to them at Boston. The defendants, connecting carriers, residing in Massachusetts, received the goods from the New York transportation company. On the arrival at Boston the goods were demanded, but refused because delivery was not then convenient, and the same afternoon they were unloaded and placed in defendant's warehouse, too late for delivery. The same night the warehouse and goods were burned up. *Held*, that defendants were liable for the goods, although under Massachusetts decisions a railroad company under similar circumstances would not have been liable.

ACTION for value of goods intrusted for carriage. The opinion states the case. Defendant had judgment below.

Faulkner v. Hart.

Samuel Hand, for appellants.

George H. Forster, for respondents. Inasmuch as delivery was to be made in Boston, where the loss occurred, the law of Massachusetts should control. *Barter v. Wheeler*, 49 N. H. 9; s. c., 6 Am. Rep. 434; *Gray v. Jackson*, 51 N. H. 9; s. c., 12 Am. Rep. 1; *Curtis v. D., L. & W. R. Co.*, 74 N. Y. 116; s. c., 30 Am. Rep. 271; *Knowlton v. Erie R. R.*, 19 Ohio St. 260; s. c., 2 Am. Rep. 395; *Norway Plains Co. v. B. & M. R. R.*, 1 Gray, 263; *Rice v. Hart*, 118 Mass. 201; s. c., 19 Am. Rep. 433. They cannot therefore be held in this case upon any supposed contract made by them within the State of New York, or its jurisdiction. *Sherman v. Hudson River R. R. Co.*, 64 N. Y. 260; *Ætna Ins. Co. v. Wheeler*, 49 id. 616; *Hunt v. N. Y. & Erie R. R. Co.*, 1 Hilt. 228; *McDonald v. Western R. R. Co.*, 34 N. Y. 497; *Rogers v. Wheeler*, 52 id. 262; *O'Neil v. N. Y. C. & H. R. R. Co.*, 60 id. 138. The general obligation created by the law of the place of delivery, in respect to the mode of delivery by a carrier, controls. *Rawson v. Holland*, 59 N. Y. 613, 615, 616; s. c., 17 Am. Rep. 394; *Van Santvoord v. St. John*, 6 Hill, 157; *Goold v. Chapin*, 20 N. Y. 259; *McDonald v. Western R. R. Co.*, 34 id. 497; *Root v. Great Western R. R. Co.*, 45 id. 524; *Mills v. Michigan Cent. R. R. Co.*, id. 622; s. c., 6 Am. Rep. 152; *Fenner v. Buffalo & State Line R. R. Co.*, 44 N. Y. 505, 511; *Fenshaw v. Rowland*, 54 id. 242; *Pelton v. Rensselaer & Saratoga R. R. Co.*, id. 214; s. c., 13 Am. Rep. 568; *Nutting v. Conn. River R. R. Co.*, 1 Gray, 502.

MILLER, J. The goods, for the value of which the plaintiffs claim to recover in this action, were shipped at New York, to be transported to and were consigned to them at Boston; and they were called for on the day of their arrival, but a delivery was refused until the next day, because it was not convenient for the defendant to deliver them. They were unloaded from the cars the same afternoon, but too late for delivery, and were placed during the night of that day in the defendant's warehouse, and before the plaintiffs had an opportunity to make another demand the warehouse, together with the goods, was destroyed by fire. The plaintiffs were doing business both in New York and Boston, and all resided in Boston except one of them, who lived in New Jersey. The contract for the transportation of the goods was made in New

York, with the Norwich and New York Transportation Company, in behalf of itself and the connecting carriers to Boston, and they were to be conveyed to Boston. The last part of the route they were placed in cars upon the road operated by the defendants.

The rule as to the liability of carriers under the facts stated is well established by the law merchant, and the authorities are numerous which sustain the position that the carrier is bound to pay for the loss of the goods destroyed. It is his duty not only to transport the goods, but he has not performed his entire contract as a common carrier until he has delivered the goods, or offered to deliver them to the consignee, or has done what is equivalent, by giving to the consignee, if he can be found, due notice after their arrival, and by furnishing him a reasonable time thereafter to take charge of, or to remove the same. *Gatliffe v. Bourne*, 4 Bing. N. C. 314; s. c., 11 Cl. & Fin. 45; *Price v. Powell*, 3 Comst. 322; *Zinn v. N. J. St. Co.*, 49 N. Y. 442; s. c., 10 Am. Rep. 402; *Sherman v. Hudson River R. R. Co.*, 64 N. Y. 254; *The "Sultana" v. Chapman*, 5 Wis. 454; *Sleade v. Payne*, 14 La. Ann. 453; *Graves v. H. & N. Y. St. Co.*, 38 Conn. 143; s. c., 9 Am. Rep. 369; *C. & R. I. R. R. v. Warren*, 16 Ill. 502; *Moses v. B. & M. R. R.*, 32 N. H. 523; *The Tangier*, 1 Cliff. 396.

In view of the rule laid down in the authorities cited, there would appear to be no serious question as to the plaintiffs' claim to recover for the value of the goods actually destroyed. The right of the plaintiffs to recover is resisted, and exemption from liability is claimed, by reason of the decisions of the courts of the State of Massachusetts, holding adversely to the rule which is established at common law, and which, as we have seen, has been generally adopted and sustained in this country and in England. The decisions of that State establish that the proprietors of a railroad, who transport goods for hire and deposit them in a warehouse until the owner or consignee has a reasonable time to take them away, are not liable as common carriers for their loss by fire, without negligence or default on their part; that the railroad corporation ceases to be a common carrier, and becomes a warehouseman, as a matter of law, when it has completed the duty of transportation, and has assumed the position of a warehouseman, as a matter of fact, and according to the usages and necessities of the business in which it is engaged. *Norway Plains Co. v. B. & M. R. R. Co.*, 1 Gray, 263; *Rice v. Hart*, 118 Mass. 201; s. c., 19 Am. Rep. 433. These decisions are

Faulkner v. Hart.

entitled to the highest respect ; but like all other adjudications, are the subject of revisal, limitation, and even to be overruled in the court in which they originated. The same right exists in other courts to consider and pass upon the same question ; and how far they should be allowed to control their decisions in a cause of action where the contract was made in one State, and performed in part in another State where the law has been decided differently, is the question now to be determined. It was long since held in this State that we could not break in upon the settled principles of our commercial law to accommodate them to those of any country. *Aymar v. Sheldon*, 12 Wend. 439; 27 Am. Dec. 137. This principle is well established in regard to all contracts of a commercial character ; and so far as may be practicable, it is of no little importance that the rule should be harmonious and uniform. Contracts of this description have been the subject of frequent consideration in the Federal courts, and the decisions have been direct and clear that while the decisions of local courts in reference to matters purely local in the States are obligatory throughout the country, they are not conclusive and final as to questions of commercial law. In *Swift v. Tyson*, 16 Pet. 19, the court say : “ The true interpretation and effect of contracts and other instruments of a commercial nature are to be sought, not in the decisions of local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court, but they cannot furnish positive rules or conclusive authority by which our own judgments are to be bound up and governed.” In a recent case *Oates v. Nat. Bank*, 100 U. S. 239, the State court in Alabama held that by the rules of the commercial law, one who receives a promissory note as collateral security for a pre-existing debt does not become a purchaser for value in the course of business, so as to cut off equities which the maker may have against the payee ; and on appeal it was held that the courts of the United States are not bound by the decisions of the State courts upon questions of commercial law. This principle has been repeatedly upheld in other cases. *Meade v. Beale*, Taney, 339, 360 ; *Austen v. Miller*, 5 McLean, 153 ; *The Ship George*, Olcott, 89 ; *Pine Grove v. Talcott*, 19 Wall. 666 ; *Robinson v. Com. Ins. Co.*, 3 Sumn. 220. In *Meade v. Beale*, *supra*, it is said : “ Where the State court does not decide a case upon the particular law of the State or established

usage, but upon general principles of commercial law, if it falls into error, that erroneous decision is not regarded as conclusive."

From the authorities cited it follows that if the higher court in the State of Massachusetts has made an erroneous decision, wrong in principle and contrary to a well-settled rule of commercial law in the English courts, in the Supreme Court of the United States, and many of the State courts, and especially adverse to the decisions of this court, it should not be followed here; and it is not only the right, but the duty of this court to adhere to its own decisions. Any other rule would lead to confusion in regard to a principle of general application; for if the doctrine of the Massachusetts court is to prevail, the right of the aggrieved party might depend upon the fact whether the action was brought in the Federal or the State court; and if the action in this case had been brought in the Circuit Court of the United States for the State of Massachusetts, the plaintiffs would be entitled to recover, while in the State court a different result would prevail. *Richardson v. Goddard*, 23 How. 38; *The Tangier*, 1 Cliff. 396; *Moses v. B. & M. R. R.*, 32 N. H. 523. This court has the same authority to disregard the Massachusetts decisions, in a case involving a commercial question, as that court had to establish a rule adverse to the decisions of this court, as was done, virtually, in the cases cited. Nor is it important to determine whether, upon a reconsideration, any different rule would have been adopted. It is sufficient to say that in reference to a law *not* of a single State but affecting the commerce of the world, the decisions of the courts of such State are not obligatory upon the courts of other States or countries.

The learned counsel for the respondents argues, that as the delivery of the goods was to be made in Boston, where they were destroyed, the law of Massachusetts should control in respect to such delivery; and we are referred to several decisions which, it is claimed, sustain this doctrine. *Barter v. Wheeler*, 49 N. H. 9; *Gray v. Jackson*, 51 id. 9; s. c., 12 Am. Rep. 1; *Knowlton v. Erie Railway Co.*, 19 Ohio St. 260; s. c., 2 Am. Rep. 395; *M. & St. P. R. Co. v. Smith*, 7 Chic. Leg. News, 174. While these cases uphold the general principle that where the contract is to be performed partly in one country and partly in another country, each portion is to be interpreted according to the laws of the country where it is to be performed — a rule which is fully sustained by authority (see Story on Cont., § 655; *Pope v. Nickerson*, 3 Story, 474, 485; *Scudder v.*

Faulkner v. Hart.

Union Nat. Bank, 1 Otto, 413; *Pomeroy v. Ainsworth*, 22 Barb. 118), none of them hold that where a great principle of commercial law has been established, which is universally acknowledged and acquiesced in, the law announced by the courts of a single State can overturn that principle and control the decisions of the courts of another and a distant State. No such question arose in any of the cases cited; and the answer to the position taken, that the decision of the local courts should control, is that such decisions are not, under the circumstances, a correct interpretation of the rule of law in such a case, and are not the accepted law of the land. It is erroneous and must fall, for the reason that it cannot be upheld, either upon principle or authority.

Nor are any of the authorities cited applicable to the case considered. As to those cited from the State of New Hampshire it may be remarked that the precise question was presented in *Moses v. B. & M. R. R. Co.*, 32 N. H. 523, where the goods were transported to Boston and burned before the consignee had an opportunity to remove them; and the authority of the Massachusetts cases was repudiated, and it was said that by the rule there laid down the salutary principles of the common law are sacrificed to considerations of convenience and expediency, in the simplicity and precise and practical character of the rule which it established. The case of *Curtis v. D., L. & W. R. R. Co.*, 74 N. Y. 116; s. c., 30 Am. Rep. 271, involved a question as to the effect of a local statute of Pennsylvania, limiting the defendant's liability, upon the law applicable to such a case in the State of New York. It was held that the *lex loci contractus* did not control, the place of delivery being a material and important part of the contract and in contemplation of the parties at the time. It was said that it was a reasonable inference that it was entered into with reference to the laws of the place where delivered. The case last cited did not involve any such question as is here presented, as there was no conflict in reference to the decisions of the courts, and no question made as to any general rule of commercial law being involved, as is the case here.

If there had been a positive statute of the State of Massachusetts providing that the carrier's liability should cease when the goods had been deposited at the end of the route in a suitable warehouse, a different question would arise, and it might well be contended, that as the question arose under the statute of that State, the question of liability would depend upon the construction placed

upon such statute by the court in Massachusetts, in accordance with the decisions of the courts of this State and the Supreme Court of the United States. *Jessup v. Carnegie*, 80 N. Y. 441; s. c., 36 Am. Rep. 643; *Mills v. M. C. R. R. Co.*, 45 N. Y. 626; s. c., 6 Am. Rep. 152; *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Elmendorf v. Taylor*, 10 Wheat. 152; *Shelby v. Guy*, 11 id. 367; *Town of Ottawa v. Perkins*, 94 U. S. 260; *Fairfield v. County of Gallatin*, 100 id. 47. But no such question arises in the case at bar. So also if the Massachusetts cases were decisive as to the law upon the question considered, it might well be urged that the plaintiffs entered into the contract having them in view. But as we have seen, they are not conclusive, and the real point is, what is the common-law rule? And the courts of Massachusetts having decided one way, and the courts of the United States and of this State, as well as those of other States and countries, differently, it is open, in a case arising in the courts of this State, to determine the true rule. It is the same subject, and involves the precise point, whether the common law shall prevail, and whether the decision of the State court is erroneous. The question is not as to the application of a local statute or a local law, but one of a comprehensive character, affecting a general rule applicable to all contracts of the nature of the one now involved.

The fact that the defendants were not carriers between New York and Boston, but only for a portion of the route, and that they made no contract directly with the plaintiffs, cannot affect the question as to the liability upon the contract made on their behalf for transportation over their portion of the route. As the original contract was made in New York for a through transportation, the connecting carrier was entitled to all the benefits of the contract, as well as to any special exemptions it contained. *Maghes v. C. & A. R. R. Co.*, 45 N. Y. 514, 521; s. c., 6 Am. Rep. 124; *Lamb v. Same*, 46 N. Y. 271; s. c., 7 Am. Rep. 327. For the same reason they would be subject to all the obligations incurred thereby. The contract between the first carrier and the connecting carrier is deemed to have been made for the shipper's benefit, and is ratified by bringing the suit. *Green v. Clark*, 2 Kern. 343. And each of the connecting lines is responsible for injuries on its own line, except where there is an express contract for carriage beyond the terminus. *Condict v. G. T. R. R. Co.*, 54 N. Y. 500; *Root v. G. W. R. R. Co.*, 45 id. 524; *Sherman v. H. R. R. R. Co.*, 64 id. 260

Faulkner v. Hart.

The contract, being made in New York, is binding upon the plaintiffs, the shippers, and the defendants, the connecting carriers, so far as they undertook to perform it; and although their liability arose at the end of their route, yet it was under the contract as made in New York.

We are referred to a number of cases by the learned counsel for the respondents, to sustain the proposition that the general obligation created by the law of the place of delivery, in respect to the mode of delivery by a carrier, controls; and it is urged that when by the law of the place of delivery the carrier had a right to store the goods, the nature of the bailment is changed, and the carrier is relieved from the responsibility originally assumed, and the liability of a warehouseman is substituted. We do not deem it necessary to controvert the correctness of the rule laid down, where it does not interfere with the general principles and doctrines of commercial jurisprudence; but there is no case cited which holds that the court of another State, where an action is pending, may not adhere to its own rules and disregard the decision of a State which overrules a great principle. As we have seen, the United States Supreme Court have refused to sustain the decisions of the State court when violating a great principle; and the rule is a sound one which upholds the position that the decisions of the State court should not be followed to such an extent as to make a sacrifice of truth, justice and law. *Gelpcke v. Dubuque*, 1 Wall. 175, 205; *Olcott v. Supervisors*, 16 id. 678. It is upon a principle of comity, that one State recognizes and admits the operation of the laws of another State within its own jurisdiction, where such law is not contrary to its own rules of policy, or to abstract right, or the promotion of justice and morality; but this principle should never be carried to the extent of holding that a suitor in its courts is debarred from the maintenance of his just rights according to its well-established decisions and laws, and the general principles of the common law which it has fully recognized and which are almost universally regarded and accepted, in reference to the question presented, wherever the common law prevails. No rule of comity demands any such sacrifice in the business intercourse between the people of the different States, and great injustice might follow by yielding to such a principle, and in sustaining a rule of law which was wrong in itself, hostile to the policy and law of the State where the contract was made, and adverse to the general cur-

rent of authority elsewhere. *King v. Sarria*, 69 N. Y. 24; s. c., 25 Am. Rep. 128.

In the consideration and determination of the case before us, it is worthy of notice that the contract made in New York, as the record shows, was in effect in conformity with the usual course of business, that the goods were to be delivered to the consignees. In *Rice v. Hart*, *supra*, the contract was merely to transport to Boston, and was silent as to delivery. It may perhaps be doubted whether the agreement to deliver to the plaintiffs as consignees was satisfied by a delivery to the defendants, especially after a demand by the plaintiffs and a refusal to deliver to them.

If the shipper was entitled to the benefit of a contract to deliver the goods to the consignees without any restriction, it is not entirely clear that the rule laid down in the Massachusetts decisions is applicable. Without however expressing a decisive opinion upon the question last discussed, for the reasons already apparent, the rule adopted in the Massachusetts cases cannot be sustained. It should not be overlooked that the point presented does not involve solely a question as to a local law, but part of a system of general commercial law. That the court in Massachusetts had decided the law contrary to what it was is not controlling; for it may be assumed, even if the parties had knowledge of the decision, that they knew it was contrary to the current of authority in similar cases, and contracted, having in view the law as it actually existed. Like an unconstitutional law, void of itself, the decision was not the law, and is not to be regarded as authority for that reason.

The judgment should be reversed, and judgment should be rendered in favor of the plaintiffs for \$6,156.95, with interest from November 7, 1872, with costs.

Judgment accordingly.

All concur, FOLGER, C. J., and EARL, J., concurring in result

Ormes v. Dauchy.

ORMES V. DAUCHY.

(83 N. Y. 443.)

Evidence — presumption — conflict of law.

Although lotteries are illegal in New York, yet a contract made there to advertise in Virginia a lottery to be drawn in Virginia, will not be held invalid in the absence of any proof of the law of Virginia. (*See note, p. 584.*)

ACTION on contract. The opinion states the facts. The plaintiff had judgment below.

N. C. Moak, for appellants.

John E. Risley, for respondent.

MILLER, J. This action was brought to recover of the defendants commissions upon a contract for advertising, which was procured by the plaintiff and his partner, one Niles, for the defendants, who were advertising agents. The defendants agreed with the plaintiff and his partner that if they would obtain the employment of the defendants, by the officers of a Virginia corporation, to procure the advertising work of the association to be done in various newspapers throughout the country, the defendants would pay the plaintiff and his partner ten per cent on the contract price of the advertising done. The contract for the advertising was obtained by means of plaintiff and Niles, who assigned his interest therein to the plaintiff; but the proof does not show the exact nature or the terms of such contract, and it was not introduced in evidence upon the trial. The defendants set up as a defense, that by the contract the defendants agreed to print and publish, in various newspapers in the State of New York and elsewhere, notices showing where tickets could be purchased in a lottery owned and conducted by the corporation referred to, and claimed that the contract was illegal and void under the statutes of this State relating to lotteries, and that no recovery can be had for that reason.

The question to be determined, is whether an illegal contract was made by the plaintiff and his associate, Niles, with the defendants,

for the publication of a lottery advertisement, in violation of the statutes of the State of New York, which prevented a recovery.

[Omitting a question of fact.]

It being thus uncertain as to the exact nature of the contract, and no evidence being given of a publication in any newspaper in the State of New York, and proof being given to show that the monthly bills rendered by the defendants for the publication were far less than what was originally stated to be the charge for all the newspapers on the list, it was a question of fact for the consideration of the jury whether the contract embraced any newspapers published within the State of New York. Such being the case, there was no error committed by the judge in denying the motion to dismiss the complaint, unless the contract to advertise in other States was illegal and void. This, we think, was not the case in this State. In *Charles v. People*, 1 Comst. 184, which arose upon a writ of error upon a conviction upon an indictment for a violation of the statute cited, BRONSON, J., says: "Our legislature has no extra-territorial jurisdiction; and when it forbids, in unqualified terms, the doing of an act, it must always be understood that the thing is only forbidden within this State." The publication therefore outside of the State was not within the prohibition of the statute of this State; and as there is no proof that the law of any other State was violated, and as the law will not presume an agreement void as illegal, or against public policy, when it is capable of a construction which would make it consistent with the laws and valid, it cannot be considered as illegal. *Curtis v. Gokey*, 68 N. Y. 304. Even if it be conceded that at common law lotteries are nuisances and illegal, and that the presumption is that the common law prevails in other States, this rule cannot be invoked to sustain a defense to a contract which was legal and valid in the State where it was made.

In regard to the State of Virginia, it may be remarked that there is no direct proof that the contract made was invalid by the laws of that State.

[Omitting a point of practice.]

Judgment affirmed.

All concur.

NOTE BY THE REPORTER. — There is no doubt of the general doctrine, that in the absence of proof the common law will be presumed to prevail in other jurisdictions. It is sometimes said that the law of the forum will be presumed to prevail. But we think this remark must be limited to common-law doctrines, and cannot be applicable to statutory provisions. *Gordon v. Ward*, 16 Mich. 363. There is some conflict on this point. Still we

Ormes v. Dauchy.

think it is pretty clearly settled that no presumption of the identity of the foreign law with the statutory *lex fori* will be entertained to defeat a contract.

Wharton says (Ev., § 314): "Ordinarily, in one State in the American Union, the laws of another State will be presumed to be the same as the *lex fori*, in all matters not involving local statutory idiosyncracies; and this presumption continues until rebutted by proof of a difference. Yet as is elsewhere seen, when there are two conflicting laws, that will be accepted which will best sustain an obligation. Hence the presumption of identity will not be applied when the effect is to defeat the intention of the contracting parties." And at section 1250: "Suppose a contract is good by the *lex solutionis*, and bad by the *lex loci contractus*, or the converse; which law is to apply? This question may be illustrated by cases in which a contract by the one law is void for usury, and by the other law is valid; and by cases in which an obligor is *capax negotii* by the one law, but is a minor by the other. It has been argued that in such cases the court must arbitrarily apply the law to which the obligation, on abstract reasoning, is subject. It has been answered, however, and with good reason, that parties who enter into a contract are to be presumed to do so *bona fide* intending the contract to be performed; and that they are supposed, if two systems of law are before them, by one of which the contract would be good, by the other of which it would be bad, to incorporate in the contract the law which would make the contract operative. So on the same principle it has been held that where a party undertakes to perform a contract in a particular place, he will be presumed to intend that the contract should be construed according to the usages and laws of such place."

Thus, in *Cutler v. Wright*, 23 N. Y. 472, it was held that a contract made in Florida, which would have been void for usury in this State, must be held valid, in the absence of averment and proof of the Florida law. The court said: "If the defendant intended to avail himself of that defense, it is well settled, he must have pleaded it. Not having done so, we are to assume, that by the laws of Florida, the contract and rate of interest reserved in the note are unobjectionable." *Smith v. Whittaker*, 23 Ill. 367, was also a case of usury. The court there said: "We must presume that there were laws in that country, regulating trade, commerce, and the buying and selling of property, and that a sale may be made upon credit and notes given by purchasers, and that they were sanctioned by the local law. And when suit is instituted on such an instrument made in a foreign country, or in a sister State, or in a territory of this government, if not repugnant to our laws, our courts will presume that the contract was made in conformity to the laws of the place of its execution, and will hold, in the absence of such a plea and proof, that the defendant admits the legality of the contract. The provision of a foreign law is a fact, which must be pleaded, and when pleaded must be proved, as any other fact." This is probably in some sense *obiter*, for the defense of usury was not pleaded, nor did it appear that the note was made out of Illinois. The rate of interest reserved, however, was larger than the legal rate in Illinois.

In *Kermott v. Ayer*, 11 Mich. 181, it was held that there is no presumption of law that the rate of interest in a foreign country is the same as that established by statute in Michigan. "No presumption can exist that any country has adopted our local statutes."

In *White v. Friedlander*, 35 Ark. 52; it was held that in absence of proof of the law of Tennessee, a note, payable in Tennessee, will be enforced in Arkansas, although usurious by Arkansas laws. The court said: "We cannot presume that laws of a penal nature, involving forfeitures, are the same in other States as our own. Independently of statutes, there is no principle of common law defining usury, or punishing it with forfeitures."

In *Kenyon v. Smith*, 24 Ind. 11, an action on a note bearing ten per cent interest, and alleged to have been made in New York, where the legal rate was seven per cent, there was no proof of the legal rate in New York, and the court therefore affirmed a judgment for six per cent, the legal rate in Indiana. The question was not discussed, but in effect the decision is a departure from the doctrine of the preceding cases cited, for by their doctrine the recovery should have been for ten per cent.

In *Ellis v. Marmon*, 19 Mich. 186; s. c., 2 Am. Rep. 81, it was held that it would not be presumed that the Illinois law required a contract for the sale of land to be in writing. "A parol contract to sell land was good at common law. It is only made void by statute. If we should make any presumption, in the absence of evidence, as to the provisions of any foreign laws, it would be that they conform in substance to the general principles of the

Ormes v Dauchy.

common law. How universally we could make such a presumption it is not necessary to consider now. We certainly cannot presume that the legislature of another State has adopted all of our statutes, and therefore we must have proof before we can know that they have passed any statute. * * * If the contract in question was required by the statutes of Illinois to be in writing, the statutes should have been introduced. In the absence of such proof it was properly assumed to be valid.

In *Wheeler v. Constantine*, 39 Mich. 62; s. c., 38 Am. Rep. 355, it was held that a note valid in Michigan is there presumed valid in Indiana; and if an Indiana woman pleads her disqualification to make a note given by her for goods purchased by her in Michigan, she must support it by proof of the Indiana law.

There is a dictum in *Pierce v. Chicago, etc., Ry. Co.*, 36 Wis. 263, that in the absence of proof, the exemption laws of Illinois will be presumed the same as in Wisconsin. This is without consideration.

It is however founded on *Rape v. Heaton*, 9 Wis. 328, where it was held that in the absence of proof courts will presume the laws of foreign and sister States to be the same as their own, and it is incumbent on the party relying on the foreign law to show the difference, if any exists. But this was not a case arising upon the question of the validity of a contract in its origin, and so is outside the principle under discussion. The same is true of the cases upon which that decision was founded, namely: *Sherrill v. Hopkins*, 1 Cow. 161; *Legg v. Legg*, 8 Mass. 99; *Holmes v. Boughton*, 10 Wend. 75; *Monroe v. Douglass*, 1 Sed. 447.

It is thoroughly settled that where a contract is made in one country, to be performed in another, the *presumption* is that the parties contracted with reference to the laws of the latter. This question was learnedly argued by counsel in *Brown v. Freeland*, 34 Miss. 181. The court said: "The presumption is never to be indulged that parties intended, in making their contract, to violate the law; and if there be two laws with reference to which they may contract, and the contract accords with one of the laws, it must be presumed that the parties so intended, because they had their election to mould their contract according to either law; and as the law presumes in favor of a contract and not against it, the presumption must be that the parties had in view the law which will give full effect to their contract." So in *Hyde v. Goodnow*, 3 Const. 269: "If a contract be made in one State or country, and it appears upon its face that it is to be performed in another, it will be presumed that the contract was entered into with reference to the laws of the latter, and those laws will be resorted to in ascertaining the validity, obligation and effect of the contract." To the same effect, *Bayliffe v. Butterworth*, 1 Ex. 429; *Pollock v. Stables*, 12 Q. B. (N. S.) 705; *Graves v. Legg*, 2 H. & N. 210.

In *Hyde v. Goodnow*, *supra*, HARRIS, J., after laying down the general principle as quoted above, continued: "This general rule however has its exceptions; one of which is, that where a contract is declared void by the law of the State or country where it is made, it cannot be enforced as a valid contract in any other, though by its terms it was to have been performed there. Thus assuming that the contract in question had been made in Ohio, and that by the laws of that State such contracts are declared void, the courts of this State would be found also to declare them void, though by their terms they were to have been performed here, and though if made here they would have been valid contracts. This exception is required by that just comity and public convenience upon which all international law is founded. A contract which is illegal and void, either by the law of the place where it is made, or that of the place where it is to be performed, is illegal and void everywhere.' This language is *obiter*, because the court held that the contract was made in New York, and was lawful under New York law, and therefore the prohibition of the Ohio law was of no effect. But assuming that it correctly expresses the law — and we can see no reason to doubt it — the principal case can be distinguished and taken out of reach of its meaning. The contract in the principal case was to advertise in Virginia a lottery to be drawn in Virginia. This was not explicitly forbidden by the New York statute, nor would any court give it such effect by implication. The New York statute only prohibited lotteries in New York, and consequently, the advertising of such lotteries. Therefore the court said: "Even if it be conceded that at common law lotteries are nuisances and illegal, and that the presumption is that the common law prevails in other States, this rule cannot be invoked to sustain a defense to a contract which was legal and valid in the State where

Hunt v. Purdy.

it was made." If the New York statute had forbidden its citizens to conduct lotteries in other States, and declared void all contracts made by them in this State for advertising such lotteries in newspapers printed in other States, the holding might have been different.

HUNT V. PURDY.

(85 N. Y. 486.)

Surety — notice to sue principal — requisites of — when delay excused.

A few weeks before the maturity of a mortgage a surety for its payment told the holder to collect the mortgage "and not to let it run over the time it is due." The holder delayed three years. The mortgagor was insolvent at the maturity of the mortgage and so remained. There was no finding that the property would then have brought more than at the time of the suit on trial, and no evidence of the extent of depreciation, if any. *Held*, that the delay was immaterial, and that the notice was insufficient.

ACTION to foreclose a mortgage. The facts appear in the head note and opinion. The plaintiff had judgment below.

J. S. Millard, for appellants.

Edward T. Lovatt, for respondent.

FOLGER, C. J. The finding of the trial court is conclusive upon the issue of a usurious contract. The testimony was conflicting; and that as to the lack of knowledge and intent upon the part of the plaintiff so positive that the finding is sustained.

The testimony is also conflicting as to the notice to foreclose. The additional findings however sustain the claim of the defendant, that he told the plaintiff to "collect that mortgage in the spring, and not to let it run over the time it is due." That saying was in January or February, 1875. The trial court found that it did not give notice, sufficient or otherwise, to plaintiff to discharge Field from his liability, even if there had been negligence on the part of the plaintiff in enforcing the collection; and it refused to find that the plaintiff was guilty of such negligence. On these findings and refusals to find, the defendant does not establish a defense. Even if a sufficient notice had been given, and not observed by the plaintiff, the defendant Field would not have been relieved of liability,

unless the failure of the plaintiff to observe the notice had resulted in injury to the defendant; and it could have so resulted only in one way. If when the notice was given, the plaintiff could lawfully have put the bond and mortgage in force and then have collected thereby more than he can now collect thereon in this action, the defendant would be harmed. The plaintiff could not have then collected more on the bond, unless the plaintiff was then solvent and is now insolvent, or unless the mortgaged premises would then have brought more at judicial sale than now. Now the testimony does not make it clear that the mortgagor was more solvent and able to pay than now. There was an attempt to show it; but the testimony is such that we cannot say that there was not evidence to sustain the finding made, that Purdy, at the time when the mortgage could first have been enforced by legal proceedings, was hopelessly insolvent, and has so remained. Nor does the testimony show that a judicial sale would have then brought more than it now will. There is no finding made or asked to that effect. There is testimony that when the notice was given, the lands were not worth the mortgage; and there is testimony that at a time after that and before the commencement of the action, it was worse in that regard. But there is no testimony of how it was in that respect at the time of the trial, or when the answer was put in. Nor is there testimony at all to show the extent of the depreciation of the lands in value, nor how much, if any thing, the defendant should be relieved from liability. So that the trial court might well find that the plaintiff was not chargeable with negligence productive of damage to the defendant. The burden was upon the defendant to show solvency of Purdy at the time of the notice, and insolvency of him after the bond was capable of being sued.

But there is a more radical reason why the defendant has not established the defense. The doctrine that a surety may give the creditor notice to proceed against the principal, and if the latter refuses to the damage of the surety, the obligation of the surety is discharged or diminished, is not a favorite in the law, and is not accepted in all forums. 3 Kent Com. *124, note c. It was against opposition that it was adopted into the law of this State. See *King v. Baldwin*, 17 Johns. 384, 390, 396, 397, 402; *Colgrove v. Tallman*, 67 N. Y. 95, 99; s. c., 23 Am. Rep. 90. It is not one that is to be applied with laxity. It is certainly to be required that the surety shall deal fairly and plainly with the creditor, and shall give him to

Hier v. Abrahams.

know that he intends to put him upon his equitable duty. In my judgment, the terms of his notice should be such, as that the creditor can know from them, that he is called upon by it to choose between a diligent pursuit of the principal debtor, or a reliance upon that debtor alone for ultimate satisfaction of the debt. It is not needed that we hold that much in this case. But we may hold that the notice to the creditor should clearly inform him that he is required to take proceedings in the courts to enforce the mortgage. *Singer v. Troutman*, 49 Barb. 182; citing *Remsen v. Beekman*, 25 N. Y. 552. See also the language of SPENCER, C. J., in 17 Johns. *supra*, at page *394. We infer that the finding of the trial court, that the defendant did not give notice sufficient or otherwise to plaintiff, in order to release said Field, has in it the idea above put forth. The notice was given in January or February, 1875. There was nothing due and payable, by the condition of the bond, until the 23d day of May of that year. The plaintiff might well have understood the defendant to mean that when the bond became payable, payment should be asked for; he was not forced by the words used, at the time when they were used, to understand that collection by legal proceedings was meant. The words of the notice do not convey only the idea of a collection enforced by action, as in 25 N. Y. *supra*. They do not convey, of necessity, given at the time when it was, that the plaintiff was required to seek the aid of the courts.

For these reasons, we think, that the judgment should be affirmed.

Judgment affirmed.

All concur.

HIER V. ABRAHAMS.

(82 N. Y. 519.)

Trade-mark — "pride" — cigars.

"Pride" is a good trade-mark for cigars, and its use by others than the original user will be restrained, although accompanied by distinctive labels. (See note, p. 594.)

ACTION to restrain the competitive use of a trade-mark. The opinion states the case. The plaintiff had judgment below, which was reversed at General Term.

John C. Hunt, for appellant.

W. E. Lansing, for respondents.

RAPALLO, J. The plaintiffs, composing the firm of Hier & Aldrich, and being engaged in the business of manufacturing cigars in the city of Syracuse, claim to have adopted as a trade-mark, to be placed on boxes of cigars manufactured by them, the word "Pride," and that this trade-mark was infringed by the defendants, who were also manufacturers of cigars in the same city, doing business under the firm name of Abrahams & Co.

The trial court found as facts that the plaintiffs had, for three years before the commencement of the action, adopted and used as their trade-mark, in the manufacture and sale of cigars, the word "Pride," and that the defendants, well knowing the adoption and prior use of said word by the plaintiffs, as a trade-mark for cigars manufactured and sold by the plaintiffs to the public, imitated and used the said word "Pride," on the labels and boxes of cigars manufactured and vended by the defendants, and the said defendants, in violation of plaintiffs' rights, did manufacture and sell cigars under the color of such labels, to the public, whereby the said public were deceived into believing that they were purchasing cigars manufactured by the plaintiffs, and plaintiffs were damaged thereby.

The court held that the plaintiffs were entitled to protection in the use of their said trade-mark "Pride," and that the defendants were not entitled to use the same, and awarded a perpetual injunction, with a reference to ascertain the damages if the plaintiffs should apply therefor before the entry of judgment. The application was not made, and judgment was entered for a perpetual injunction simply, with costs.

On appeal to the General Term, this judgment was reversed, but on what ground does not appear, as no opinion was delivered. The judgment or order of reversal does not state that it was upon any question of fact, and consequently all that we have to consider is whether any error of law appears, calling for the reversal.

The facts found clearly justify the judgment rendered. The word "Pride," as applied to cigars, was an arbitrary word, not descriptive of the article, and one which the plaintiffs could lawfully appropriate as a trade-mark. No prior appropriation of it by the defendants, or any one else, is alleged in the pleadings or found.

Hier v. Abrahams.

nor does any thing appear in the findings of the fact showing the conclusions of law to be erroneous.

The counsel for the respondents argues in support of the reversal that the defendants' labels, as they appear in the pleadings, do not resemble the plaintiffs' labels. That the words, pictures and color of the labels are different.

The infringement charged is not an imitation of a symbol or label, but the appropriation of a word.

Trade-marks are of two kinds. They may consist of pictures or symbols or a peculiar form and fashion of label, or simply of a word or words, which, in whatever form printed or represented, continue to be the distinguishing mark of the manufacturer who has appropriated it or them, and the name by which his products are known and dealt in. This distinction is recognized in the statutes for the protection of trade-marks as well as in the cases. The act of 1862 (chap. 304), sections 1 and 3, makes it a misdemeanor, punishable by fine and imprisonment to counterfeit or imitate the stamp, brand, wrapper, label or trade-mark of a manufacturer, etc., or to keep for sale goods upon which counterfeited labels or trade-marks are placed. And section 4 makes it a like misdemeanor to affix to any package any label, etc., which shall designate the article by a word or words, which shall be wholly or in part the same to the eye, or in sound to the ear, as the word or words previously used by any other person to designate goods manufactured by him.

Where the trade-mark consists of a picture or symbol, or in any peculiarity in the appearance of the label, the imitation must be such as to amount to a false representation, liable to deceive the public and enable the imitator to pass off his goods as those of the person whose trade-mark is imitated. And when there is such an absence of resemblance that ordinary attention would enable customers to discriminate between the trade-marks of different parties, the court will not interfere. The case of *Popham v. Cole*, 66 N. Y. 69; s. c., 23 Am. Rep. 22, is an illustration of this rule. In that case the trade-mark was on lard, and consisted of the figure of a hog, with the name of the manufacturer and the words "prime leaf lard." The words being descriptive merely of the article, could not be appropriated as a trade-mark, but the figure of the hog was claimed to be protected as such. It represented a large, fat, well-conditioned, domestic hog, while the alleged infringement repre-

sented a small, lank and lean wild boar, and the lettering and arrangement of the two were entirely different, and it was held that no deceptive imitation was established. But where the trade-mark consists of a word, it may be used by the manufacturer who has appropriated it, in any style of print, or any form of label, and its use by another in any form is unlawful. The statute requires only that the imitation should be either the same to the eye, or in sound to the ear as the genuine trade-mark, and this accords with the authorities. The goods become known by the name or word by which they have been designated, and not merely by the manner or fashion in which the word is written or printed, or the accessories surrounding it, and the unlawful use of the name or word in any form may be restrained. In the case of the Akron Cement Company, *Newman v. Alvord*, 51 N. Y. 189; s. c., 10 Am. Rep. 588; the trade-mark consisted of the name "Akron." The genuine label was "Newman's Akron Cement Co., manufactured at Akron, New York. The hydraulic cement known as the Akron water lime." The label held to be an infringement was "Alvord's Onondaga Akron Cement or Water lime, manufactured at Syracuse, New York." The judgment was a perpetual injunction restraining the defendants from using the name "Akron." In the *Congress Spring Co. v. High Rock Spring Co.*, 45 N. Y. 291; s. c., 6 Am. Rep. 82, the trade-mark was the word "Congrese," and was used by the proprietors by branding the words "Congress Water" on their bottles. The infringement was a brand of "High Rock Congress Spring Water" and was restrained. In *Gillott v. Esterbrook*, 48 N. Y. 374; s. c., 8 Am. Rep. 553, the trade-mark was "303, Joseph Gillott extra fine," on steel pens, and the pens were known as 303 pens. The figures did not express any size or quality of the pens but were selected arbitrarily by the plaintiff. The infringement was "303," "Esterbrook & Co. extra fine," and the pens were put up in boxes similar to those of plaintiff. It was held that the plaintiff had acquired an exclusive right to the use of the figures "303" as a trade-mark.

In the present case the word "Pride" was the trade-mark. Plaintiffs' labels were "Hier & Aldrich's," and beneath that in large letters in a different type "Pride" and beneath that "Havana;" on the inside of the box was a similar label except that between the firm name and the word "Pride" was the picture of a cigar. Defendants' label was "The Pride of Syracuse," and beneath that

Hier v. Abrahams.

“Abrahams & Co.” The injunction was only against the use by the defendants of the word “Pride” as a trade-mark on cigars. Its use in connection with different words or names from those in connection with which the plaintiffs used it, does not sanction its being pirated any more than did the like use of the word “Akron,” “Congress” or the figures “303” in the cases cited, or a like variation in many others that might be cited. In the Akron cement case the difference between the labels was quite as striking as in the present case.

The dissimilarity in the form or accessories of the label can make no difference. The trade-mark consisted in the word simply, and the plaintiffs might have printed it on any form of label they might fancy, without losing the protection of the law. The defendants had no right to adopt it by merely putting it on a label of different fashion from that which the plaintiffs had been in the habit of using.

It is also claimed that it was not established that the defendants used plaintiffs’ trade-mark with intent to defraud, and the case of *Low v. Hall*, 47 N. Y. 104, is cited. That was an action for a penalty under section 4 of the act of 1862, chapter 306, as amended by section 3 of chapter 209 of the act of 1863, and by that statute the intent to defraud is made an essential element of the offense. An actual intent to defraud can hardly be deemed necessary to entitle the plaintiffs to restrain the defendants from continuing the unlawful use of the plaintiffs’ trade-mark whereby the plaintiffs are sustaining damage. The defendants cannot justly contend that they are entitled to continue to injure the plaintiffs’ business by acts which are in violation of their legal rights, on the ground that they do not intend to defraud them. The violation of their rights is in legal contemplation a fraud, and the finding that the defendants, with knowledge of those rights, invaded them and caused them damage, would justify an intendment, if one were necessary, that they did so with intent to defraud.

The only other points made by respondents’ counsel are that the finding that the plaintiffs had adopted the word “Pride” as their trade-mark is unsupported by evidence, because their trade-mark, if any, was “Hier & Aldrich’s Pride” with the figure of a cigar, and that the plaintiffs were not entitled to an injunction because their right was disputed and the injunction could not be allowed until they had established a legal right in an action at law. The

Wheeler v. Connecticut Mutual Life Insurance Company.

first point has already been answered and the second is not sustained by the authorities, but is in conflict with the cases already referred to.

The order of the General Term should be reversed and the judgment at Special Term affirmed, with costs.

Order reversed and judgment affirmed

All concur.

NOTE BY THE REPORTER.—See *Lichtenstein v. Melka*, 8 Or. 464; a. c., 34 Am. Rep. 522 and note, 593; note, 33 Am. Rep. 386.

In *Carroll v. Ertheller*, U. S. Circuit Court, Eastern District of Pennsylvania, April 6, 1890, 1 Fed. Rep. 668, a bill was filed to restrain the defendant's use of the name "Lone Jack" in connection with cigarettes, the plaintiff having previously adopted it in connection with smoking tobacco. The court said: "The second branch may most conveniently be noticed first. While the revenue law for purposes of taxation, distinguished between smoking tobacco and cigarettes, there is, we believe, no substantial difference. Cigarettes consist of smoking tobacco, similar in all material respects to that used in pipes. The circumstances that a larger cut (than that commonly used in pipes) is most convenient for cigarettes is not important; nor that the tobacco is smoked in paper instead of pipes. It may all be used for either purpose, and is all embraced in the term 'smoking tobacco.' We do not believe that the public or the trade draws such a distinction as the defendant sets up. 'The dominating characteristic of the plaintiff's trade-mark is the name 'Lone Jack.' His tobacco has come to be known by this name to such an extent that the accompanying device has ceased to be important if it ever was so. At home and abroad, to the trade and the public, it is familiarly known as 'Lone Jack,' and is thus designated as the plaintiff's manufacture, by purchasers and sellers. The defendant's application of this name to his smoking tobacco is an adoption and use of the essential part of the plaintiff's trade-mark. Surrounding it with a different device signifies nothing to the public. The defendant's name upon the cigarettes, if recognized, would not inform the public that the tobacco is not of the plaintiff's manufacture. That the defendant's act is calculated to mislead can hardly be doubted; that it has misled, the plaintiff's affidavits, we think, show; and the inference that the defendant supposed it would mislead, and intended it should, cannot be well avoided. Why otherwise did he adopt this particular name? He knew it to be the recognized designation of the plaintiff's tobacco which had become popular." Citing *McLane v. Fleming*, 6 Otto, 245; *Machine Co. v. Wilson*, L. R., 3 App. 878.

WHEELER V. CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

(83 N. Y. 542.)

Insurance — life — failure to pay premiums through insanity — dividends.

The insanity of the insured is not an excuse for his failure to pay premiums, and where the premiums are not paid the insurer is not bound without demand to apply unpaid dividends thereon. (*See note, p. 600.*)

ACTION on a life insurance policy. The opinion states the case. The defendant had judgment on demurrer at trial, and this was reversed at General Term.

Wheeler v. Connecticut Mutual Life Insurance Company.

Everett P. Wheeler, for appellant. Equity will relieve against a forfeiture caused by the non-payment of premiums upon a policy of life insurance. *Cohen v. N. Y. Mut. Life Ins. Co.*, 50 N. Y. 610; s. c., 10 Am. Rep. 522; *Sands v. N. Y. Life Ins. Co.*, 50 N. Y. 626; s. c., 10 Am. Rep. 535; *Homer v. Ins. Co.*, 67 N. Y. 478, 481; *Hamilton v. Mut. Life Ins. Co.*, 9 Blatchf. 234; *N. Y. Life Ins. Co. v. Clopton*, 7 Bush, 179; s. c., 3 Am. Rep. 290; *Worth v. Edmonds*, 52 Barb. 45. The payment of the premium was a condition subsequent. *People v. Security L. Ins. Co.*, 78 N. Y. 115, 126; s. c., 34 Am. Rep. 522. Equity will relieve against a forfeiture for breach of a condition subsequent, caused by unavoidable accident, by fraud, by surprise, or by ignorance not willful. 2 White & Tudor's Lead. Cas. in Eq., 1105 [4th ed.], note to *Sloman v. Water*; *Eaton v. Lyon*, 3 Ves. Jr. 690; *Hill v. Barclay*, 18 Ves. 56, 62; *Harris v. Troup*, 8 Pai. 423; *Bargent v. Thompson*, 4 Giff. 478; *Henry v. Tupper*, 29 Vt. 358. The insanity alleged could justly be called the "act of God." 2 Kent Com. 597; *Baldwin v. N. Y. Life Ins. Co.*, 3 Bosw. 530; *Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. 276; s. c. 4 Am. Rep. 675.

W. A. Beach, for respondent.

MILLER, J. The complaint in this action sets forth alleged causes of action upon two separate policies of insurance, claiming to recover the amount named in each, and also alleges that a dividend was declared out of the surplus earnings and receipts of the company, for a portion of which the insured was entitled to a paid-up policy, which on demand was refused. The demurrer to the complaint presents the question whether any cause of action is set forth therein.

The policies upon which this action was brought provided for the payment of an annual premium, and contained a condition as follows: "That this policy shall not take effect until the advance premium hereon shall have been actually paid, during the life-time of the insured, and that if any subsequent premium on this policy be not paid when due, then this policy shall cease and determine (except as hereinafter provided), and this company shall not be liable for the payment of the sum insured herein, nor of any part thereof." The annual premium due on the 28th of October, 1873, was not paid; the complaint alleges, and upon demurrer it must be

Wheeler v. Connecticut Mutual Life Insurance Company.

taken as true, that previous to the day last mentioned, Vose, the insured, became and was by visitation and act of God insane, and consequently unable to and did not pay the premium, although he had means to pay the same ; but he was bereft of his reason and so continued until his death which occurred March 17, 1874, and in consequence thereof did not know nor remember that said premium was then due, nor that he had agreed to pay the same.

Vose having died without a payment of the premium, according to the terms of the contract, the question arises whether his insanity is an excuse for non-payment and the forfeiture is thereby waived. Courts of equity will relieve against a forfeiture in many cases, but none of the decisions have gone to the extent of holding that insanity will constitute an excuse for failing to comply with the terms of the condition referred to. In *Rose v. Rose*, Amb. 332, Lord HARDWICKE, laid down the rule thus : "Equity will relieve against all penalties whatsoever ; against non-payment of money at a certain day ; against forfeitures of copyholds ; but they are all cases where the court can do it with safety to the other party ; for if the court cannot put him into as good condition as if the agreement had been performed, the court will not relieve." Even if a condition subsequent becomes impossible by the act of God, or of the law, or of the obligee, etc., the estate will not be defeated. Co. Litt. 206 b. The defendant here could not well be placed in as good a condition as it had been by the payment of the premium after a forfeiture, for by such payment it would be compelled to pay the amount named in the policies, thus adding to its obligation.

So also where the contract is for personal services, which none but the person contracting can perform, inevitable accident, or the act of God, will excuse non-performance. But when the thing or work to be performed may be done by another person, then all accidents are at the risk of the promisor. Story on Bailments, § 3; and notes ; *Wolfe v. Howes*, 20 N. Y. 197 ; *Clark v. Gilbert*, 26 id. 279 ; *Spaulding v. Rosa*, 71 id. 46 ; s. c., 27 Am. Rep. 7. In the present case, the condition did not require the insured himself to pay the premiums, and it could have been done quite as well by any one on his behalf. After Vose became insane he was not really the party in interest. He had assigned the policies to his children, and they were the parties interested therein and to be affected by a failure to perform the condition of the contract. Although Vose was their guardian, if incapacitated by his insanity a competent

Wheeler v. Connecticut Mutual Life Insurance Company.

person could have been appointed in his place ; and hence his insanity was not necessarily an insuperable obstacle to their performance of the condition of the policy, and they were not relieved thereby. So long as the act could be performed by any other person, its performance did not depend upon Vose's continued capacity ; and although rendered incapable by his insanity, the case is not within the rule which relieves a party from the consequences of an omission to do an act rendered impossible by omnipotent power. Broom, Leg. Max. (6th Am. ed.), 178, 179 ; *Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. 276 ; s. c., 4 Am. Rep. 675.

While as a general rule, where the performance of a duty created by law is prevented by inevitable accident, without the fault of a party, the default will be excused, yet when a person by express contract engages absolutely to do an act not impossible or unlawful at the time, neither inevitable accident, nor other unforeseen contingency not within his control, will excuse him, for the reason that he might have provided against them by his contract. *Dexter v. Norton*, 47 N. Y. 62 ; s. c., 7 Am. Rep. 415 ; *Harmony v. Ringham*, 12 id. 99, 107 ; *Tompkins v. Dudley*, 25 id. 275. The principle thus established has been especially applied in reference to policies of insurance, where the payment of the premium is held to be a condition precedent which must be kept or the policy falls. *Roehner v. Knickerbocker Life Ins. Co.*, 63 N. Y. 160 ; *Evans v. U. S. Life Ins. Co.*, 64 id. 304 ; *Beebe v. Johnson*, 19. Wend. 500. In the case last cited, it was laid down that to excuse non-performance, it must appear that the act to be done could not by any means have been accomplished.

The learned counsel for the plaintiff seeks to distinguish 63 N. Y. 160 and 64 id. 304, above cited, from the case at bar ; but we are unable to perceive any such difference as prevents an application of the principle decided in these cases, and we think that they are directly in point upon the question discussed. Reliance is also placed upon decisions of this court in *Cohen v. N. Y. Mut. Life Ins. Co.*, 50 N. Y. 610 ; s. c., 10 Am. Rep. 522, and *Sands v. N. Y. Life Ins. Co.*, 50 N. Y. 626 ; s. c., 10 Am. Rep. 535, to sustain the theory of the plaintiff. Those decisions hold that the occurrence of war between two States forbid and excused the transmission and payment of premiums on the policies then in question from one State to another, and legally excuses their payment ; and as the premiums could not be paid as they fell due, they were suspended,

Wheeler v. Connecticut Mutual Life Insurance Company.

and a tender, after the termination of the war, with interest, renewed the policies. This condition of affairs arose from the belligerent attitude between the hostile States, which rendered it impracticable to comply with the terms of the contract. War necessarily prevented communication between the citizens of such States; and as it existed without the fault of the insured, in the cases cited, and for that reason no intercourse could be maintained for business purposes, the insured were not in any sense in fault for a failure to comply with the conditions contained in the policies in question. As it was impossible for either one of the insured to pay the premium required, or to procure any one else to do so upon his behalf, there is no satisfactory reason why he should not be excused. This rule, which is well settled by the law of nations, rests upon grounds of public policy by which contracts between belligerent States are suspended during the war, but are not annulled. This doctrine is founded upon the principle that the State, and not the individual, wages the war. *Phill. Int. Law*, 666; *Wheat. Int. Law* (8th ed.), 403, § 317. The cases cited are not analogous; for while here the individual can pay or provide for payment through another, in case of war he is entirely helpless to fulfill and carry out the contract, and at the mercy of the government. The authorities of the hostile States have placed it beyond his control, suspended all intercourse, stopped all business relations, and laid a heavy arm upon all communications between their citizens. As there is no ability to fulfill, no means of paying, the justice and propriety of the rule is apparent, while its application in the case at bar cannot be upheld upon any such ground. There is, we think, a wide distinction in principle recognized in the books between inability to fulfill the terms of the contract, where, by the act of two governments war intervenes and prevents a fulfillment, and where the default arises from a duty or charge which has been assumed by the party and is capable of fulfillment either by himself or by another on his behalf.

While a court of equity will interpose its power to relieve against forfeitures for a breach of a condition subsequent caused by unavoidable accident, by fraud, surprise or ignorance, in many cases, that power has never been extended so as to excuse a breach of a contract of this description arising from the disability of a party caused by sickness or insanity.

The case of *Baldwin v. N. Y. Life Ins. Co.*, 3 Bosw. 530, which

Wheeler v. Connecticut Mutual Life Insurance Company.

is cited and relied upon by the appellant, involved no question as to the non-payment of the premium, but related to a provision in the contract whereby the insured was licensed to travel in prohibited localities, returning within a specified period, and was prevented by illness from performing the condition. It was analogous to contracts for personal services, to which reference has been had, and the authority has no application in the case considered. Besides it is overruled by *Evans v. U. S. Life Ins. Co.*, *supra*. In the case at bar, it is not claimed that the performance was strictly impossible, and therefore that it was excused by law or that equitable relief should be granted upon that ground ; and we are unable to discover that a case is made out, within any acknowledged principle, which authorizes the interposition of a court of equity.

Nor is there any ground for claiming, that by the provisions of the contract, the intention of the parties was that the terms of payment should not be obligatory in cases of unavoidable sickness or of insanity. The law places a reasonable construction upon all contracts, but in cases of insurance policies, where the prompt payment of premiums is an important element of the business, and forms the basis of its calculation by the compounding of interest thereon, it is scarcely to be supposed that such payment can be waived, except in conformity with some established rule of law or by express agreement.

The claim of the plaintiff that the moneys in possession of the company belonging to Vose, being dividends on the policies in question, should be applied in payment of the premiums falling due, is without merit, as such dividends would have been insufficient to pay the premiums due, even if applied. Nor were the company bound to pay such dividends to the insured and notify him that the policy was forfeited if not applied. The money was never demanded, nor any request made to apply the same ; and hence the defendant was under no obligation to apply or to pay the dividends on account of the premiums. The views expressed lead to the conclusion that no action lies to recover the amount named in the several policies mentioned in the complaint, or the dividends, and the demurrer must be sustained, unless it can be upheld upon some other ground.

The allegations in the complaint in regard to dividends which have been earned, and the refusal of the defendant to issue a paid-up policy, stand, we think, in a different position.

Wheeler v. Connecticut Mutual Life Insurance Company.

[On this ground] the judgment of the General Term should be reversed and that of the Special Term affirmed, with leave to the defendant to answer upon the usual terms.

Judgment accordingly.

All concur, except FOLGER, C. J., and ANDREWS, J., who being interested as policy-holders in the defendant, took no part.

NOTE BY THE REPORTER.— In *Klein v. N. Y. Life Ins. Co.*, United States Supreme Court, October, 1881, the policy was for the benefit of the plaintiff, the wife of the insured, and payment was conditioned on punctual payment of premiums. Default was made, and the defendant refused to pay the amount of the policy. The plaintiff filed a bill alleging, as ground for relief, that the policy was taken out by Frederick W. Klein without the knowledge of his wife, and that she had received no information of its terms or conditions until after the death of her husband; that he was taken down by the illness of which he died about February 1; that for about twenty days prior to March 1, and thence up to the time of his death, he was, in consequence of his sickness, deranged in mind and incapable of attending to any matter of business whatever, and for that reason, and that alone, failed to pay the premium when it was due, and that the appellant failed to pay it because she was ignorant of the existence of the policy and of its terms. The court said: "We cannot accede to the view of the appellant. Where a penalty or forfeiture is inserted in a contract merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory. *Sloman v. Walter*, 1 Bro. Ch. 419; *Sanders v. Pope*, 12 Ves. 332; *Davis v. West*, 12 Id. 475; *Skinner v. Dayton*, 2 Johns. Ch. 535; 10 Am. Dec. 266. But in every such case the test by which to ascertain whether relief can or cannot be had in equity is to consider whether compensation can or cannot be made.

"In *Rose v. Rose*, Amb. 332, Lord HARDWICKE laid down the rule thus: 'Equity will relieve against all penalties whatsoever, against non-payment of money at a day certain, against forfeiture of copyholds, but they are all cases where the court can do it with safety to the other party, for if the court cannot put him in as good condition as if the agreement had been performed, the court will not relieve.'

"A life insurance policy usually stipulates, first, for the payment of premiums; second, for their payment on a day certain; and third, for the forfeiture of the policy in default of punctual payment. Such are the provisions of the policy which is the basis of this suit. Each of these provisions stands on precisely the same footing. If the payment of the premiums, and their payment on the day they fall due, are of the essence of the contract, so is the stipulation for the release of the company from liability in default of punctual payment. No compensation can be made a life insurance company for the general want of punctuality among its patrons.

"It was said in *New York Life Ins. Co. v. Statham*, *supra*, that 'promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of premiums when due, but upon compounding interest upon them. It is on this basis that they are enabled to offer insurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Delinquency cannot be tolerated or redeemed except at the option of the company.'

"If the insured can neglect payment at maturity and yet suffer no loss or forfeiture, premiums will not be punctually paid. The companies must have some efficient means of enforcing punctuality. Hence their contracts usually provide for the forfeiture of the policy upon default of prompt payment of the premiums. If they are not allowed to enforce this forfeiture they are deprived of the means which they have reserved by their contract of compelling the parties insured to meet their engagements. The provision therefore, for the release of the company from liability on a failure of the insured to pay the premiums when due is of the very essence and substance of the contract of life insur-

Wheeler v. Connecticut Mutual Life Insurance Company.

ance. To hold the company to its promise to pay the insurance, notwithstanding the default of the insured in making punctual payment of the premiums, is to destroy the very substance of the contract. This a court of equity cannot do. *Wheeler v. Conn. Mut. Ins. Co.*, 82 N. Y. 543; see also, the opinion of Judge GHOLSON in *Robert v. New England Life Ins. Co.*, 1 Dis. 355.

"It might as well undertake to release the insured from the payment of premiums altogether as to relieve him from forfeiture of his policy in default of punctual payment. The company is as much entitled to the benefit of one stipulation as the other, because both are necessary to enable it to keep its own obligations.

"In a contract of life insurance the insurer and insured both take risks. The insurance company is bound to pay the entire insurance money, even though the party whose life is insured dies the day after the execution of the policy, and after the payment of but a single premium.

"The assured assumes the risk of paying premiums during the life on which the insurance is taken, even though their aggregate amount should exceed the insurance money. The assured also takes the risk of the forfeiture of his policy if the premiums are not paid on the day they fall due.

"The insurance company has the same claim to be relieved in equity from loss resulting from risks assumed by it as the insured has from loss consequent on the risks assumed by him. Neither has any such right."

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

GOODMAN V. LITAKER.

(84 N. C. 8.)

Surety — relation not appearing on face of instrument — defense.

If one has executed an instrument, apparently as principal but really as surety he is bound to the creditor as principal unless the creditor knew the true character of the obligation.

ACTION on a bond. The opinion and head note show the point. The plaintiff had judgment below.

W. H. Bailey, for plaintiff.

RUFFIN, J. [Omitting immaterial remarks.] We find the authorities somewhat divided upon the point as to whether a joint maker of a note may for any purpose be shown by parol to be but a surety, when that fact does not appear on the face of the instrument. But the weight of authority and analogy seems inclined to the opinion that he may; but all, even those who go the farthest in upholding this right of the surety, concur in saying in the most emphatic terms, that before the party thus seeking to set up his

Goodman v. Litaker.

new relationship can derive any benefit therefrom, he must first bring home to his creditor a knowledge of its existence.

The very recent work of Brandt on the law of Suretyship and Guaranty, at section 20, thus states the rule: "Where a surety sets up claims depending on that relation and the fact of suretyship does not appear from the instrument signed by him, he must in order to sustain such claims prove that the creditor had knowledge of the suretyship." And in support of the proposition, he cites a very large number of decisions rendered in the highest courts of the several States. To the same effect is the decision of the Supreme Court of Massachusetts in the case of *Wilson v. Foot*, 11 Metc. 285. In the trial of the case of *Manley v. Boycott*, 75 E. C. L. 45, when counsel was urging upon the court the right of the maker of a promissory note to show that he signed the instrument as surety only, Lord CAMPBELL interposed the remark that it must be shown that the note was so made with the knowledge of the payee; that allegation is indispensable. Such a conclusion seems not only to address itself to our reason, but to be eminently just; and especially so under a system which like our own prescribes different periods for the protection of principals and sureties.

Between the makers themselves the relation of principal and surety subsists, and out of it arise duties that the law will enforce, and rights which the law will protect. It will not allow even the creditor, after a knowledge of the existence of their rights is brought home to him, to do aught to impair them. But this is not upon the ground that they entered into and made a part of his contract with the parties, for how could they, when he was ignorant of the very existence of the relation out of which they grew? but upon a distinct and independent principle of equity altogether, that he must do nothing to lessen the security or impair the rights of the surety against his principal, after being fixed with a knowledge of such rights. And it matters not when this knowledge reaches him, whether at the time of the execution of the original contract, or at any time subsequently thereto. Among the rights of the surety so protected, is the one of having the debt paid so as to terminate his liability; and if with a view to having this done, he gives his creditor notice of his real standing in the matter, and demands that such steps shall be taken to enforce collection as the law authorizes him to insist upon, then the creditor is bound to comply, and a failure to do so is at his peril; and in order thus to fix the creditor

First National Bank of New Windsor v. Bynum.

with notice and raise this equity for the surety, parol evidence is competent. This we understand to be the extent of the decision rendered in *Cole v. Fox*, 83 N. C. 463. In this case now under consideration, there is no such point made for the defendant, and no pretense that the creditor ever had any notice of his claim to be treated as surety.

We therefore hold there is no error in the judgment of the court below.

Judgment affirmed.

No error.

FIRST NATIONAL BANK OF NEW WINDSOR V. BYNUM.

(84 N. C. 24.)

Negotiable instrument — uncertainty as to time and amount — equities.

An instrument in the form of a note, payable on a certain day, for a certain amount, with counsel fees and expenses of collection if sued or placed in the hands of an attorney for collection, and conditioned that the payee shall have power to declare it due before maturity at any time he may deem it insecure, is not negotiable, and is subject to equities although transferred before maturity.*

CONTROVERSY submitted without action on an instrument of which the following is a copy :

“On September the 1st, 1879, we jointly and severally promise to pay to the order of the Taylor Manufacturing Company two hundred and fifty dollars, payable at the First National Bank of Wilson, N. C., for value received, with exchange on New York, and if not paid when due, to bear interest from maturity at the rate of eight per cent per annum as agreed for negotiating and carrying this loan so long as it remains unpaid, and also all counsel fees and expenses in collecting the note, if it is sued on or placed in the hands of an attorney for collection. The express condition of the sale and purchase of the engine separator for which this note is given, is such, that the title, ownership or possession does not pass from the said Taylor Manufacturing Company of Westminster, and said company have full power to declare this note due and take possession of said engine separator at any time they may deem this

* To same effect, *Bullock v. Taylor* (39 Mich. 187), 33 Am. Rep. 356; *Johnston v. Spear*, post.

First National Bank of New Windsor v. Bynum.

note insecure, even before the maturity of the same." Signed by Bynum & Daniel, at Wilson.

The payee for a valuable consideration indorsed said instrument in Maryland to the plaintiff bank before maturity and without any notice of any defense. At the time of the indorsement to the plaintiff, the payee was indebted to the defendants in the sum of \$305.15, which indebtedness still subsists. The defendants had judgment below.

Connor & Woodard, for plaintiff.

Hugh F. Murray, for defendants.

ASHE, J. The only question presented by the appeal is whether the indebtedness to the defendants can avail them as a set-off, counter-claim, or defense against the demand of plaintiff, and that depends upon the character of the writing declared on — whether it is negotiable or not?

The essential element of a negotiable promissory note is, that it should be certain. Certainty, first, as to the payee; secondly, as to the maker; thirdly, as to the amount to be paid; fourthly, as to the time when the payment is to be made; and fifthly as to the fact itself of the payment. 1 Pars. on Bills and Notes, 30. The instrument under consideration is wanting in two of these qualities, to wit, in the amount to be paid and the time of payment. In addition to the specific sum promised, it stipulates for the payment on of "all counsel fees and expenses in collecting the note if it is issued or placed in the hands of an attorney for collection;" and it is made payable in current rate of exchange on New York. The stipulation in a written promise to pay a certain sum and also "all fines according to rules," "all other sums that may be due, the current rate of exchange to be added," or "deducting all advances or expenses," has been held to deprive the instrument of the character of negotiability. 1 Pars. 37.

In *Woods v. North*, 84 Penn. St. 407; s. c., 24 Am. Rep. 201, where the action was on a note in which there was a promise to pay a certain sum, and five per cent collection fee, if not paid when due, SHAKSWOOD, J., says: "It is a necessary quality of a negotiable paper that it should be simple, certain, unconditional, and not subject to any contingency." And it was held in that case that the insertion in the note of the clause, "and five per cent collection fee

First National Bank of New Windsor v. Bynum.

if not paid when due," rendered the note uncertain and destroyed its negotiability.

In Missouri it has been held that an instrument whereby the maker promises to pay a specific sum, and agrees, if the sum be not paid at maturity and the note is placed in the hands of an attorney for collection, to pay ten per cent in addition as an attorney fee, is not a promissory note, as a part of the amount agreed to be paid is uncertain and contingent. *Bank v. Gay*, 63 Mo. 33 ; s. c., 21 Am. Rep. 430 ; *Goodloe v. Taylor*, 3 Hawks, 458.

But there is another serious objection to the claim set up for the negotiability of this instrument. It stipulates that the payees shall have full power to declare the note due at any time they may deem the note insecure, even before the maturity of the same. This divests it of the quality of certainty in the time of payment, which as has been shown is one of the essential elements of negotiability. The time of payment may be hastened at the option of the payees, and is therefore uncertain. And it has been held in Michigan that it is essential to a promissory note that it be payable at a time that must certainly arrive in the future, upon the happening of some event, or the completion of some period, not depending upon the volition of any one. *Brooks v. Hargreaves*, 21 Mich. 254.

Relying upon these authorities we hold that the instrument in question is not negotiable.

The next inquiry is, can the defendants, the note being assigned before maturity, avail themselves of the indebtedness of the assignor to them, as a valid defense to the action?

In the early history of the law, the transfers of all choses in action, including bills and notes, were forbidden by the common law, the rigid rule of which was first relaxed by the use of bills of exchange, which was the result of commercial convenience ; and hence the law on this subject is termed the "Law Merchant." Promissory notes were first made negotiable in England, like inland bills of exchange, by the statute of 3 and 4 Anne, ch. 9, and in this State by our act of 1862, which is a literal copy of that statute. But to attain the negotiability intended to be conferred by that act, it must possess all the attributes of an inland bill of exchange as to certainty, etc.; and if it should lack any of its essential qualities, it would still be a common-law instrument and subject to the principles of that law in regard to choses in action. As for instance, where a non-negotiable note is assigned, the action at law must be brought by the

Reynolds v. Pool.

assignee in the name of the assignor; and the assignee is put by the assignment in no better condition than the assignor, and only steps into his shoes, and the note assigned is subject to all the equities and defenses which existed between the original parties before notice of the assignment; and it made no difference whether the note was assigned before or after maturity. The rule that the indorsee of a bill or note before maturity takes it freed from all equities and defenses, except indorsed payments, is a principle of the Law Merchant, and applies to negotiable instruments, but has no application to notes that are not negotiable. Where an action is brought on a note of the latter class by the assignee in the name of the assignor, the rule is, that the equities set up by the defendant against the assignee must be such as subsisted at the time the defendant received *notice of the assignment*. 1 Dan. Neg. Inst. 555; 1 Pars. Notes and Bills, 46; *Harris v. Burwell*, 65 N. C. 584. But the common-law rule that an action by the assignee of a paper that is not negotiable must be brought in the name of the assignor has been changed in this State by section 55 of the Code, so as to enable him to sue in his own name, but without prejudice to any set-off or other defense existing at the time of or before notice of assignment. This section, it will be seen, makes no change whatever in the law, except as to allowing the assignee to sue in his own name instead of that of the assignor.

There is no error, and the judgment of the Superior Court of Wilson must be affirmed.

Judgment affirmed.

No error.

REYNOLDS V. POOL.

(84 N. C. 87.)

Partnership — agreement to work farm on shares.

An agreement to carry on a farm, one furnishing the land, outfit and necessary money; the other furnishing laborers and superintending; half the money furnished to be repaid; and the profits to be divided between them, constitutes a partnership. (*See note, p. 600.*)

CLAIM and delivery. The opinion states the case. The defendant had judgment below.

D. G. Fowls, for plaintiffs.

T. M. Argo and *W. H. Pace*, for defendant.

SMITH, C. J. The plaintiffs were entitled to have the instruction asked given to the jury, that taking all the evidence most favorably for the defendant, McPheeters and Belvin were partners in the cultivation of the farm during the year in which the cotton in dispute was raised. The agreement entered into is thus described by Belvin: "On the first Monday in February, 1878, I agreed with McPheeters (acting for the owner of the land) to farm for the year 1878 on these terms: He was to furnish the outfit and the land; I was to hire hands and superintend the making of the crop; he was to provide money to pay the hands and carry on the business; for one-half of which, as well as for the like proportion of the hire and cost of feeding the mules and horse, he was to be repaid by having the amount applied in reduction of his indebtedness to me previously incurred, and we were to divide the profits." The testimony of the agent differs mainly in that he confines the moiety of the expenses to be credited on the indebtedness to the hire and feeding of the mules and horse, and both agree that operations were to be conducted at their joint and equal expense, and the net proceeds to be equally divided between them. The concurring statement of both creates the relation of partners between them, and so the jury should have been instructed. We deem it necessary to recur to but two adjudications in this court in support of the proposition.

In *Holt v. Kernoldle*, 1 Ired. 199, a contract was entered into between the proprietors of a blacksmith shop and one who followed that calling, whereby the former were to furnish the shop and every thing needful in carrying on the business and a house and provisions for the blacksmith and his family; and after reimbursement of all these advancements for the conduct of the business, the payment for provisions supplied and for rent of the house *out of the profits*, the residue was to be equally divided between them. This was held to constitute a copartnership, and RUFFIN, C. J., delivering the opinion, says: "The ordinary test however of a person being a partner, is his participation in the profits of the business; and we believe there can be no instance in which there is to be a participation in them *as profits*, in which every person having a right to share in them is not thereby rendered a partner to all intents and

Reynolds v. Pool.

purposes. It is so between the parties themselves, because the one of them does not look to the other personally for restoring to him his capital or remunerating him for his labor, but each looks to the assets or joint fund for these purposes, and ascertains his interest by taking an account of the concern." Not less pertinent and decisive is the case of *Lewis v. Wilkins*, Phil. Eq. 303. There the agreement was that the owner should furnish the farm for two years with the stock thereon, and the mules, farming implements and provisions; the other party to supply the necessary labor, and to give his personal attention to the business, and the two were *to share equally in the products of the farm*. This was declared to establish a copartnership. The facts of the case before us clearly bring it within the operation of the principle enunciated in those cited, since the expenses were to be paid and the residue of the farm products then divided *as profits* between the parties. The special arrangement for the advancement of the needed funds by one, and the payment of the ratable share thereof by the other out of a pre-existing indebtedness, can in no manner affect their relation as copartners in their transactions with others, or impair the just claims of creditors of the copartnership. The funds supplied by the plaintiffs for the purpose of carrying on the common business — all of it thus used, according to the testimony of one, and a part only, according to the testimony of the other, are a sufficient consideration for the creation of a partnership debt; and the instrument forming an agricultural lien vests the property in the crop in the plaintiffs for its security and payment.

There is error in the refusal of the court to give the required instruction, and there must be a new trial, and it is so ordered.

Venire de novo.

Error.

NOTE BY THE REPORTER. — The contract in this case seems an exception to the usual contract in cases of working farms on shares. Generally the contract is to share the *produce*, and this does not constitute a partnership. But here the agreement was to share the *profits*, and not explicitly as compensation. Sharing profits as such, and not as compensation, may constitute a partnership.

In *Putnam v. Wise*, 1 Hill, 234, the agreement was that one should occupy and work a farm, and for the use of the land should give the owner one-half the grain and wool raised by him on it. *Held*, not a partnership. Cowen, J., said: "An agreement by two, to perform a job of work, the compensation-money to be equally divided, does not make a partnership. Here was to be a division of the gross earnings of the farm; and in such a case, even had the arrangement been to sell the crops in common, and divide the money, this would not have been within the law of partnership, a sharing of profit and loss. A., owning a saw mill, agreed with B. to work it and divide the gross earnings equally. *Held*, not

Reynolds v. Pool.

partners. *Ambler v. Bradley*, 6 Vt. 119. PHELPS, J., said: "They never shared in profits and loss. The share which the occupier received was a mere compensation for his labor." So, in *Lamb v. Grover*, 47 Barb. 817, A. agreed to furnish groceries to B. to sell, and to pay the rent of the store; B. to have one-half the profits. Held, not a partnership, but an agreement for compensation. Substantially the same was held in *Richardson v. Bugh*, 76 N. Y. 55; s. c., 33 Am. Rep. 287.

In *Christian v. Crocker*, 25 Ark. 327, a firm contracted with laborers to pay them one-third the proceeds of the crop for their labor. Held, that the latter were not partners with the former. This is "a rule by which the tenant may be paid."

In *Moore v. Smith*, 19 Ala. 774, the plaintiff agreed to serve as overseer, to furnish hands and horses to be worked with those of the defendant on defendant's plantation, to pay the expenses of himself, his hands and his horses, and he was to have one-fourth of the crop raised as his compensation. Held, not a partnership. The court drew a "distinction between a participation in the profits as profits, and sharing in the profits as a mode of compensation," and between gross profits and net profits. They quote Story's rule, "that the party is to participate indirectly, at least, in the losses as well as in the profits, or in other words, that he is to share in the net profits and not in the gross profits." To the same effect, *Holloway v. Brinkley*, 42 Ga. 226; *Smith v. Summerlin*, 48 Id. 425; *Randle v. State*, 49 Ala. 14; *Blue v. Leathers*, 15 Ill. 31.

In *Holmes v. Old Colony R. Co.*, 5 Gray, 58, the company rented a hotel for a certain sum and half the net profits. Held, not a partnership, even as to third persons. Stress was laid on the absence of "any specific lien on the profits to the exclusion of other creditors."

See *Chester v. Dickerson*, 54 N. Y. 1; s. c., 13 Am. Rep. 550; *Parker v. Canfield*, 37 Conn. 260; 9 Am. Rep. 17.

In *Donnell v. Harshe*, 67 Mo. 170, an instruction that if one was to occupy and cultivate another's farm for a given length of time, and each was to receive a moiety or share of the crops raised or grown thereon under such agreement, this constituted a partnership, was held erroneous. Citing *Dry v. Boswell*, 1 Camp. 329; *Ambler v. Bradley*, 6 Vt. 119; *Putnam v. Wise*, 1 Hill, 234; *Diwinel v. Stone*, 30 Me. 384; *Caswell v. District*, 15 Wend. 37; *Denny v. Cabot*, 6 Met. 82; *Harrower v. Cole*, 19 Barb. 331. The same doctrine was held in *Musser v. Brink*, 68 Mo. 242. Speaking of *Donnell v. Harshe*, the court said: "The only observable difference between that case and the present one is, that here, with money furnished by plaintiff, cattle were to be purchased to eat the produce raised on the farm. We do not think this case can be distinguished in principle from the one just mentioned, where we cited with approval the case of *Diwinel v. Stone*, 30 Me. 384, wherein it was ruled that a mere participation in profit and loss did not necessarily constitute a partnership. SHEPLEY, C. J., remarking: 'There must be such a community of interest as empowers each party to make contracts, incur liabilities, manage the whole business and dispose of the whole property, a right which, upon the dissolution of the partnership by death of one, passes to the survivor, and not the representatives of the deceased.' If we test the case at bar, by the rule thus announced, it is very easy to see that the agreement in question does not evidence a partnership, and this, for the reason that it does not confer on each party power to manage the whole business and dispose of the whole property."

In *McCrary v. Slaughter*, 58 Ala. 230, we have a case very similar in circumstances to the principal case, and a like holding. The court said: "The facts are, that appellant was the owner of an undivided half of a plantation, situate in Dallas county, and Blair, though not the owner, had possession, and the right to occupy the other undivided half. In 1866 and 1867, it was cultivated by the appellant and Blair, each furnishing one-half the labor, and the appellant furnishing the mules, or the necessary team, and Blair devoting his personal services to the supervision of its cultivation, and the expenses of the plantation to be borne by them equally, the proceeds or profits of the crops to be equally divided between them. These facts embrace every element of a partnership. There was a union of the use and occupancy of the lands, of the mules or team provided by the appellant, of the labor each party furnished, of the skill and service of Blair in supervising the cultivation, community in the expenses of the plantation, and in the proceeds or profits of the crops. It may not have been, and was not contemplated, that either party should acquire any right or interest in the property the other contributed to the joint undertaking. It is not necessary to constitute a partnership, that there should be property forming its capital.

Reynolds v. Pool.

jointly owned by the partners. The property employed in the partnership business may be the separate property of the partners, but if they share in the losses and profits arising from its use, a partnership exists. *Champion v. Bostwick*, 18 Wend. 188. If there is a joint undertaking, and a community of profit and loss, each party sharing in these mutually, and having a specific interest in the profits, not as compensation for services rendered, but as an associate in the undertaking, the relation of partners is formed. Collyer on Part. ch. 1. The obvious difference between this case and that of *Moore v. Smith*, 19 Ala. 774, to which we are referred, is the community of profit and loss in which Blair and the appellant were to participate. If there was no profit, neither had a specific interest in the crops or their proceeds. If there was a loss, each was bound to contribute equally to make it good; while in the case cited, Smith had a defined interest of one-fourth in the crops, as compensation for his services, without regard to the profit or loss resulting from the farming operations."

Autrey v. Frieze, 60 Ala. 587, goes further and holds that the parties are partners even where the agreement is to share the crops, and not explicitly to share the profits. The court said: "It is difficult to suppose the parties contemplated all the incidents of a commercial partnership—that of unlimited power in either partner to charge the partnership by contract within the scope of the partnership business, and the unqualified power of disposition of the partnership effects. These incidents were not in the contemplation of the parties, and when their contract is construed in the light of the circumstances surrounding them, it is certain if their attention had been directed to them, some limitation or restraint on the power of the parties respectively would have been imposed. But while these incidents were not in the contemplation of the parties, it is certain they agreed to have a joint interest in the crops, and to share the profits and losses arising from their cultivation. There was not, and the parties did not intend there should be any property, other than the crops, jointly owned by them. This was not essential to constitute them partners. They did intend, and such is their contract, that the appellant should contribute the use of the land, and of a mule, and the appellee his personal skill and services, and the use of two mules. The forage of these mules was to be provided in particular proportions specified. Labor was to be employed and paid for and other expenses to be incurred. The laborers, and these expenses, were to be paid by them jointly, and in equal proportions. When these were paid, the crops were to be equally divided. There is manifestly a community of interest in profit and loss. Neither partner could claim any specific interest in the crops, until an adjustment and satisfaction of the wages of the laborers, and other expenses incurred in the cultivation and gathering. It was possible these wages and expenses would exceed the value of the crops—unpropitious seasons, floods, or other accidents, against which neither skill nor industry can guard, may have so reduced them in quantity, that their value would not equal, or would fall below the costs of the cultivation. If this had been true, each party was bound to contribute equally to the loss. The appellant would have lost not only the use of the land and of the personal property which was employed in its cultivation, but also one-half of the losses resulting from the excess of the expenses over the value of the crops. The appellee would have lost the one-half of such excess, his personal services, and the use of his horses or mules. Where parties have a joint interest in, and share the profits and losses arising from the use of property or skill, either separately or combined, they are partners. *Champion v. Bostwick*, 18 Wend. 188; *Emanuel v. Draughn*, 14 Ala. 306." The same was held in *Adams v. Carter*, 53 Ga. 160, as to third persons; and in *Holifield v. White*, 52 Id. 567, the same was held as to the parties between themselves. The court said: "White was to furnish the land and stock, and Royal the labor and pay for it. This made, as they rated it, each of them equal contributors toward the farming adventure into which they had agreed to enter. After that they were to bear equally the expense of feeding the stock and laborers, and all other plantation expenses, and thus make a crop, which was to be theirs equally, and to be divided between them. There was something more in this than a common interest in the profits. It is different from the case of *Holloway v. Brinkley*, 42 Ga. 226, for there the stipulation was that one of the parties was to work the land furnished by the other, and receive for his labor one-half of the crop. Nor was there any agreement, as there is in this, that the expenses of the venture were to be borne equally by the parties. So in *Smith v. Summerlin*, 48 Ga. 425, there was no provision made that they were to share the expenses for

Mason v. Wilson.

working the farm. In fact, a contrary arrangement was agreed upon. The owner of the land was to furnish the land, wagon and team, and necessary tools, and the stock, and to feed the latter, and was to let the other have bacon at a stipulated price. The only item of expense that was to be equally paid by them was that of hauling the cotton to the gin and to market. In the case under consideration, both parties were equally interested in the whole expenses of the enterprise after it was started — every item thereof — and also in the crop, the result or profits of the adventure. This was evidently not an arrangement whereby one was merely to be paid for his labor in a certain way."

The last three cases seem to us to be opposed to the weight of authority. The Georgia cases we suspect depend on the provisions of the Code, that "a joint interest in the partnership property or a joint interest in the profits and losses of the business constitutes a partnership as to third persons; a common interest in profits alone does not."

In *Pettee v. Appleton*, 114 Mass. 114, it was held that a contract that one party shall furnish money and the other perform work for a given business, and that its net profits shall be equally divided between them, makes, without reference to their intent, a partnership as to third persons.

MASON V. WILSON.

(84 N. C. 51.)

Statute of frauds — promise to pay debt of another out of his property.

An oral promise to pay the debt of another out of his property placed in the hands of the promisor for that purpose, is not within the statute of frauds.

ACTION on defendant's oral promise to pay the debt of another to the plaintiff, out of the debtor's property in defendant's hands, as soon as he could sell it. The plaintiff had judgment below.

Platt D. Walker and Jones & Johnston, for plaintiff.

W. H. Bailey and J. M. McCorkle, for defendant.

ASHE, J. [Omitting a minor point.] The defendant contends that the action cannot be sustained, for the reason that the promise of the defendant is to pay the debt of Green and is within the statute of frauds.

In construing this statute (our act of 1819), it may be laid down as a general rule, "that a promise to answer for the debt, default or miscarriage of another for which that other remains liable, must be in writing to satisfy the statute of frauds; *contra*, when the other does not remain liable." 1 Smith L. C. 371. But there are numerous exceptions to the rule. Chief Justice KENT, in the case

Mason v. Wilson.

of *Leonard v. Vredenburg*, 8 Johns. 29 ; 5 Am. Dec. 317, went very fully and elaborately into the discussion of the many diversified and vexed questions arising in the construction of this statute, and he divided the subject into three classes :

1. Cases in which the promise is collateral to the principal contract, but is made at the same time and becomes an essential ground of credit given to the principal or direct creditor.

2. Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement of it, though the subsisting liability is the ground of the promise without any distinct and unconnected inducement.

3. A third class of cases is where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the original contracting parties.

He says the two first classes are within the statute and the last is not, and the reason given why this last class does not come within the statute is that the promise is made upon a new and independent consideration, and it matters not whether the original debt continues to subsist or not. In 1 Smith L. C. 385, as coming under the last class, a promise to pay an antecedent debt in consideration of property placed in the hands of the promisor by the debtor, or of some new engagements or contracts entered into by the creditor, has been held not to require a writing to give it validity. *Olmstead v. Gouls*, 18 Johns. 12. And in *Wait v. Wait*, 28 Vt. 350, it is decided that a parol promise to pay the debt of another in consideration of property placed by the debtor in the promisor's hands is not within the statute of frauds. It is an original promise and binding upon the promisor, and in this respect it is immaterial whether the liability of the original debtor is continued or discharged.

The same doctrine has been recognized and adopted by several decisions in this court, upon the ground that the promise made and the liability incurred are to be regarded as an original and independent promise founded upon a new consideration and binding upon the promisor, but it applies only where the property has been converted into money, and the money received. *Draughan v. Bunting*, 9 Ired., 10 ; *Hall v. Robinson*, 8 id. 56 ; *Hicks v. Critcher*, Phil. 353 ; *Threadgill v. McLendon*, 76 N. C. 24 ; *Stanly v. Hendricks*, 13 Ired. 86. In the last cited case, Chief Justice PEARSON says : " The principle is this, when, in consideration of the promise

Holman v. Price.

to pay the debt of another, the defendant receives property and realizes the proceeds, the promise is not within the mischief provided against; and the plaintiff may recover on the promise or in an action for money had and received. For although the promise is in words to pay the debt of another and the performance of it discharges that debt, still the consideration was not for the benefit or ease of the original debtor, but for a purpose entirely collateral, so as to create an original and distinct cause of action."

The case of *Threadgill v. McLendon* seems to be directly in point. There, the plaintiff furnished supplies to a cropper of the defendant upon a promise by the defendant to pay for the same, and afterward took into his possession cotton belonging to the cropper and sufficient to pay the plaintiff's account, and thereafter promised to pay the same; and it was held that the promise was not within the statute, and that defendant was liable, for the reason that the promise was not made by defendant as surety for his cropper but for himself, because the fund out of which the debt was to be paid was in his hands. It was insisted in this case by the defendant's counsel, that the case did not come within the principal of *Draughan v. Bunting*, and other cases, because the cotton had not been sold; but the objection was met by the answer that cotton was a cash article and might be readily converted into money.

Upon these authorities we hold that the promise of the defendant to pay the debt of Green to the plaintiff was not within the act of 1819, and that there is no error upon that point. The judgment of the Superior Court is therefore affirmed.

No error.

Judgment affirmed.

HOLMAN V. PRICE.

(84 N. C. 86.)

Will — construction — legacy, how shared.

A testator bequeathed a fund as follows: in equal shares, one to his married daughter, Melinda; one to Amanda, Anna and Clara, his minor daughters; and one to each of two other married daughters for life. *Held*, that the three minor daughters took each one equal share with the others.

Holman v. Price.

CONTROVERSY for construction of a will. The opinion states the case.

J. M. Clements, for plaintiffs.

J. A. Williamson and *W. H. Bailey*, for defendants.

SMITH, C. J. Moses Wagner on July 8th, 1866, made his will in which after a devise of the land whereon he resided to his wife for life and a bequest of certain personal estate, are contained these clauses:

Item 4. "I will and bequeath that my daughters, Amanda, Anna and Clara, shall receive a good English education at the cost and charge of my estate before the division takes place, which is provided for hereinafter."

Item 5. "I will all my real estate, not devised to my wife, to be sold by my administrator as soon as is practicable after my decease, and also all the land willed my wife in like manner to be sold after her death by my administrator, and the proceeds of sale shall be equally divided as follows, to wit: one share to Melinda, wife of McDonald VanEaton, one share to Amanda Wagner, Anna Wagner and Clara Wagner, and one share to the sole and separate use of Margaret, the wife of John H. Allen, free of any control of her said husband, the said Margaret to have and enjoy the interest accruing from the same during her natural life, and after her death to be divided among her children, or their issue if any be dead. And in like manner I will and devise one share thereof to the sole and separate use of my daughter Mary Ann, wife of Marion VanEaton, free of any control of her said husband, to receive and enjoy the interest accruing from the same during her natural life, and after death, the same to be divided among her children or their issue, if any be dead."

Item 6. "After the payment of my debts, and the legacies, costs and charges of executing my will, I will that the proceeds of all notes or other evidences of debt due me, also all moneys on hand and the proceeds of sale of all personal property sold, and not herein specifically bequeathed, and all the residue of my estate, real, personal and mixed, I will and bequeath that the said fund shall be divided in the same manner among my children, as the moneys arising from the real estate, and devised in the 5th item of this

will, and subject to the same conditions in all things and especially that the shares willed to my daughters, Margaret and Mary Ann, shall entitle them to receive the interest on the same during their respective lives, to their sole and separate use, free of the control of their said husbands; and after the death of each of them the shares to descend to their children in the same manner as is set forth as to the real estate in the 5th item."

In the 7th item the testator directs the sale of certain mill property and a similar disposition of the proceeds of his other estate. At the date of execution of the will the six daughters mentioned in it were living, and those who were married had removed, and were residing beyond the limits of the State. Two of them, Margaret and Mary Ann, died during the life-time of their father, leaving issue, and he died in July, 1875. The three younger daughters, Amanda, Anna and Clara, were minors and living with their parents when the will was made.

The controversy is as to the proper construction of the clauses which distribute the funds produced by the sales among the legatees, and especially whether the unmarried daughters take an equal share each with their older sister and the successors to the shares of those deceased, or together take a single and equal share to be divided among them. His honor was of opinion that Amanda, Anna and Clara were entitled to one-sixth each of the distributable estate and an equal share with the others, and in this interpretation we concur.

Wills are so diversified in form and expression, written often in haste and by persons not skilled in the accurate use of language to convey the meaning of another, that the court can seldom derive much aid from the examination of adjudicated cases, and hence the necessity of general rules as guides in the difficult task of arriving at and giving proper legal effect to the instrument. A leading principle in the interpretation of wills is to ascertain and recognize the general pervading purpose of the testator and to subordinate thereto any inconsistent special provisions found in it. This principle was pressed into service and carried to its extreme limits in the recent cases of *Lassiter v. Wood*; 63 N. C. 360, and *Macon v. Macon*, 75 id. 376. In the former, READE, J., employs this language, which in the other is cited and approved: "It is apparent that the leading purpose of the testator was to make all his children equal. The purpose of the testator, as gathered from his will, is

Holman v. Price.

always to be carried out by the court, and minor considerations, when they come in the way must yield. Especially is this so when the purpose is *in consonance with justice and natural affection.*"

A fair and equal distribution of his estate among his children, with restrictions upon the shares of two of his married daughters, is the manifest predominant intent discovered in the will of the testator. To effect this object the three younger remaining under his roof, are to have "a good English education at the cost of the estate," as, we must infer, had already been furnished to the three older who had left.

The funds, when discharged of this imposed obligation, are then to be "*equally divided*," as follows, to wit: One share to Melinda, wife of McDonald Van Eaton, one share to Amanda Wagner, Anna Wagner and Clara Wagner, and one share to the sole and separate use of the other daughters respectively with contingent limitations over. The proper construction of the terms of the bequest to the minor children, inserted between the absolute gift to one and the restricted gift to the other two married daughters, is, that they are to take distributively as the others take, and in the same sense as if the word "each" had been added after their names.

These daughters are grouped together, not to make a joint bequest to all, but because there was nothing peculiar in their social or personal relations to separate them as objects of the bounty to be provided by the common parent. This is not a strained interpretation of the words in their connections and is most obviously necessary to carry out the general intent of the testator. Why, it may be asked, should the father give those unprotected daughters equal opportunities for mutual improvement with their older sisters, and then to cut down each in the general division of the estate to one-third only of the shares which the others are to receive? This is not in harmony with that sense of moral duty and parental affection for all his children alike, so strongly impressed upon the instrument itself and indicating an intent to make his bounty equal to each.

We therefore hold that the legatees, Amanda, Anna and Clara, are entitled to an equal share each with the others, and that the one share prefixed to their names was intended to be and is, a bequest of one share to each of them.

There is no error and we affirm the ruling of the court below.

No error.

Judgment affirmed.

BOYCE V. WILLIAMS.

(84 N. C. 275.)

Trover — defense of title in a third.

In trover it is a good defense that the property belongs to a third, between whom and the defendant there is no privity.

TROVER, for cattle taken by defendant from plaintiff's possession and converted to his own use. The defendant claimed a right to take the cattle under a mortgage by Pearsall to Williams, defendant's father, and testified that the mortgage deed was made at his house and witnessed by himself, his father not being present, and he caused it to be registered ; that the deed was never delivered to or seen by Williams, and was taken by the witness under a general authority of said Harper to him to take such mortgages in his name, and that he took possession of the cattle claiming them as his own.

The court charged the jury : That if the deed was effectual, the defendant having no authority from the mortgagee to take the cattle and showing no right in himself, was liable to the plaintiff. The plaintiff had judgment below.

H. R. Kornegay, for plaintiff.

No counsel for defendant.

SMITH, C. J., after stating the case. Such we understand to be the instruction under which a verdict was rendered in favor of the plaintiff for the value of the cattle and to which exception is taken.

The action is for property taken and converted to the defendant's use, and not for damages for an invasion of the plaintiff's possessory right, and under the former practice would in form be trover instead of trespass.

The action of trespass is for an injury to the possession, and compensation in damages is recovered against a wrong-doer, commensurate with the injury sustained. In either form of action, possession of personal goods being presumptive evidence of title when not rebutted, entitles the plaintiff to recover in damages their full

Boyce v. Williams.

value. But when the action is for the conversion, or appropriation of the goods to the defendant's own use, it is a full defense to show that the goods belong to another person, and the plaintiff has no interest in them, although no privity be shown to exist between such owner and the defendant. This doctrine is settled by two adjudications in this State, to which alone we deem it necessary to refer.

In *Laspeyre v. McFarland*, N. O. Term, 187, the action was in trover for a slave in possession of the plaintiff. The defendant showed no title in himself, but offered in evidence a marriage settlement entered into between the plaintiff and his wife and one Davis whereby the slave was conveyed to the latter, as trustee to permit the wife to have the labor and profits of the slave and to allow the slave to be under the plaintiff's control. In the Superior Court upon these facts appearing the plaintiff was nonsuited. In this court, on the hearing of the appeal, RUFFIN, J., thus declares the law, in sustaining the judgment below : "It is one of the characteristic distinctions between this action and trespass that the latter may be maintained on possession ; the former only on property and the right of possession. Trover is to personals what ejectment is to the realty. In both, title is indispensable. It is true that as possession is the strongest evidence of the ownership, property may be presumed from possession. And therefore the plaintiff may not in all cases be bound to show a good title by conveyances against all the world, but may recover in trover upon such presumption against a wrong-doer. Yet it is but a presumption and cannot stand when the contrary is shown. Here it is completely rebutted by the deed which shows the title, to be in another and not in the plaintiff."

The same point came up in *Barwick v. Barwick*, 11 Ired. 80, and was similarly decided. PEARSON, J., after presenting the same views as to the law, proceeds : "But if it appears on the trial that the plaintiff, although in possession, is not in fact the owner, the presumption of title inferred from the possession is rebutted, and it would be manifestly wrong to allow the plaintiff to recover the value of the property. For the real owner may forthwith bring trover against the defendant and force him to pay the value a second time, and the fact that he had paid it in a former suit would be no defense." He adds, "that trover can never be maintained unless a satisfaction of the judgment will have the effect of vesting a good title in the defendant, except when the property is restored and the

Cowles v. Richmond and Danville Railroad Company.

conversion was temporary. Accordingly it is well settled as the law of this State that to maintain trover the plaintiff must show title and a possession, or a present right of possession "

[Omitting an immaterial remark.]

The judgment must be reversed and a new trial granted.

Let this be certified.

Error.

Venire de nova.

COWLES V. RICHMOND & DANVILLE RAILROAD COMPANY.

(84 N. C. 309.)

Master and servant — negligence — superior servant — machinery.

A railroad company is liable to an employee injured by the negligence of a superior fellow-servant whose directions he was bound to obey.

A master is liable for an injury sustained by his servant by reason of defective appliances put in his hands by himself or his agents, unless he shows that he has been diligent and circumspect in his choice of such agents and in the selection and preservation of such appliances; or that the servant knew the defects and continued to use the appliances without notifying the master of the defects; or that the servant was himself guilty of contributory negligence in such use.

ACTION of damages for personal injury. The opinion states the facts. The plaintiff had judgment below.

J. S. Henderson, for plaintiff.

J. M. McCorkle, for defendant.

RUFFIN, J. The plaintiff alleges that he was a brakeman on the defendant's road, and that he was injured by having his foot and ankle crushed while in its service and by reason of its negligence. On the trial he testified that he was under the immediate direction and order of one Garrison who was the engineer and conductor of the defendant's freight train. and on the occasion of the injuries received was ordered by him to go upon a certain car and apply the brake, so as to prevent a clash between that car and another; that he went upon the car, and while executing the order given him was injured in the manner complained of, by a collision

Cowles v. Richmond and Danville Railroad Company.

of the two cars, which collision resulted from the fact that the cars were so constructed that their "bumpers" did not correspond or fit to one another as they should have done in order to prevent the cars coming in too close contact, which defect was unknown to the plaintiff, and but for which he would not have been injured.

The defendant's counsel asked the judge to instruct the jury that if they believed that plaintiff was injured in consequence of the negligence and unskillfulness of the engineer, Garrison, then he could not recover, which the court declined to do; but told them that the plaintiff did not complain that his injuries resulted from the negligence and unskillfulness of the engineer; that the point for them to consider was whether the plaintiff was injured by reason of the defendant's negligence and without default on his part; that it was defendant's duty to furnish safe cars, supplied with the necessary machinery and appliances to render them secure, and if the jury believed that it had failed in this and thereby the plaintiff had been injured, without any neglect or want of skill on his part, then they should find the issues submitted in favor of the plaintiff without regard to the conduct of the engineer; but if they should believe that the defendant had furnished safely constructed and appointed cars, or that the plaintiff had contributed by his negligence to his own injury, then they should find for the defendant, to which the defendant excepted.

The only issue submitted to the jury was, "Did the plaintiff, while in defendant's employment, receive the injuries complained of, by reason of defendant company having carelessly and negligently provided and used unsafe and defective cars or 'bumpers,' and without the fault of the plaintiff?" to which the jury responded in the affirmative.

The defendant's exception, as argued before us, does not go to any portion of his honor's charge as given, but only to his refusal to give that specially asked for; and the purpose of counsel in making the request is admitted to have been to bring the case within the rule, so much discussed of late by elementary writers, and so often, and in some instances so variously announced by the courts, which declares that a servant who has sustained injuries by reason of the negligence of a fellow-servant in the same employment cannot maintain an action against the master, provided the latter has used due care in the selection of such fellow-servant. He should have been careful then to see that more evidence was put into the case

Cowles v. Richmond and Danville Railroad Company.

than is to be found there, going to show the respective duties, powers and conduct of the two servants, and especially their relations to each other — whether they were strictly fellow-servants occupying the same level, or whether the engineer was a superior whose commands the plaintiff was bound to obey; for in making an application of the rule, a knowledge of all these matters is absolutely necessary.

In entering the service of the defendant, the plaintiff might be and is presumed to understand and take upon himself every risk naturally pertaining to such service; and amongst others, that which may proceed from the possible carelessness of such fellow-servants as he must know, from the very nature of the employment, he may be required to associate with in the performance of his duties. But no such presumption is or should be raised, of his willingness to assume the risk growing out of the possible negligence of one, who while a servant to their common master, stands to himself in the light of a superior whose commands and directions he is bound to obey; for so to hold, in the case of a corporation, like this defendant, which can only operate through its agents and employees, would be to absolve it from all responsibility to those in its employment.

If we may infer from the meagre statement of the evidence given in the case, that the defendant's engineer stood to the plaintiff as one in authority, his case would be withdrawn from the operation of the rule; and on the other hand if it should be said that the evidence as stated is not sufficient to establish the superior authority of the engineer, we cannot see that the defendant's condition is at all improved. The verdict of the jury acquits the plaintiff of all blame and convicts the defendant of negligence; and the burden of showing an error rests upon the defendant who takes the appeal. Every presumption must be made in favor of a verdict, and as said in the case of *Honeycutt v. Angel*, 4 Dev. & B. 306, it is deemed to be right unless the record sets out so much of the proceedings at the trial below as will show affirmatively that there was an error committed. If therefore any other facts than those set out in the record are needed to support the plaintiff's claim against the defendant, we are bound to assume that they were proved on the trial. And the same principle applies with all its force to the judge's charge; we must suppose it to be correct, until so much is developed in the case as to show that it was certainly erroneous.

Cowles v. Richmond and Danville Railroad Company.

But we do not care to place our decision upon any such restricted ground as this; for we do not hesitate to say that upon the facts as stated in the record, and supposing them to constitute the whole case, we are of the opinion that his Honor's charge was correct and the verdict of the jury a rightful one.

Every person who admits another into his employment, whereby he constitutes him his servant, is bound to furnish and maintain such instruments as are suitable to his work and may be used with safety to the person employed. The law, by an implication of its own, makes such a stipulation a part of every contract for service, and in proportion as the employment is hazardous, so is the rigid enforcement of the master's duty. Nor is there any injustice to the master in this. He can if diligent and prudent procure such implements as are fit for the servant's use and by a reasonable oversight he can keep them so, while the servant is, most generally, without the ability or opportunity to detect or remedy their defects. It follows that whenever a servant, whose own conduct has been blameless, sustains an injury by reason of defects in an implement put into his hands by the master or his agents to be used in the prosecution of his work, a responsibility must attach to the master. It is true he may free himself of this responsibility to his servant by showing that he has been at all times diligent and circumspect as well in the choice of his associates as in the selection and preservation of the implements to be used by him. Or as in *Crutchfield's case*, 78 N. C. 300, he may show that his servant after having a knowledge of the defects in the machinery given him to work with, continued its use without giving notice so that they might be remedied. Or again, as said by the present Chief Justice in *Johnson v. R. R. Co.*, 81 N. C. 453, he may show that notwithstanding the existence of the defects in the machinery, no injury would have happened but for the negligence of the servant himself. But it is not sufficient for him to show, as this defendant has undertaken to do, that his servant's hurt *may* have proceeded from some one of these various excusing causes. He must show that it *did* do so.

The duty of a master to his servant and the responsibility growing out of it have very recently been discussed by the Supreme Court of the United States in the case of *Hough v. Railway Company*, 100 U. S. 213; s. c., 34 Am. Rep. 621, and again by the Supreme Court of the State of Missouri in the case of *Gibson v. Pacific Railway Co.*, 46 Mo. 163; s. c., 2 Am. Rep. 497, and this last

Jones v. Henry.

case has been treated by Thompson in his work on Negligence as a leading one on those subjects, and we think that our conclusions in this case are in accord with the principles enunciated in those cases.

We therefore hold that there is no error in the judgment of the court below and that the same must be affirmed.

Judgment affirmed.

No error.

JONES V. HENRY.

(84 N. C. 330.)

Evidence — admission of execution of bond — subscribing witness.

In an action on a bond, the entry by the clerk on the docket that the defendants admit the execution of the bond, is competent and conclusive evidence, although the bond had a subscribing witness. (*See note, p. 626.*)

ACTION on a bond. The defendants denied its execution. The bond had a subscribing witness. On the trial the plaintiff offered in evidence the following memorandum made in the case by the clerk at spring term, 1878: “*Jesse Jones v. M. R. Henry and Marcus Erwin*, continued; and the defendants admit the execution of the bond sued upon. Leave granted the defendants to amend their answer as of the present term.” This was received under objection, and the plaintiff rested. The plaintiff had judgment.

No counsel for plaintiff.

C. A. Moore, T. F. Davidson, Battle & Mordecai and F. A. Sandley for defendants.

ASHE, J. The exception of defendants to the admission of the memorandum as evidence of the execution of the bond was not well taken. As no objection was made in the court below that the memorandum was not upon the docket, we must presume that it was there entered, and being entered, it must be regarded as having been entered with the consent of the parties or their counsel, under the sanction of the court. This presumption is supported by the

Jones v. Henry.

fact that the memorandum of the admission of the execution of the bond is entered in connection with, and inserted between two orders of the court, which must certainly have constituted a part of the record of the case, namely, the order of continuance and the leave to defendants to amend their answer. These were entries such as are commonly made in a cause and are according to the practice of the court; and it is not necessary that they should be signed by the presiding judge. Entries like this memorandum upon the records of a court are not unusual where defendants, sued for a large debt, to get time, are desirous for a continuance and willing to take one upon terms; or when apprehensive of an adverse decision, to avoid the expense of the attendance of a witness residing at a distance, admit upon the record the execution of the instrument sued on. It was a private memorandum of the clerk; he had the power and it was his duty to strike it from the docket, or if it was a part of the record unauthorized or entered irregularly upon the docket, it was incumbent upon the defendants to move to have it expunged therefrom; but so long as it remains upon the docket it must be deemed as having the force and effect of a record, and conclusive. If it was a mere private memorandum or an unauthorized entry, that fact on a motion to strike it out could have been proved by the affidavits of the clerk and the parties. *Austin v. Rodman*, 1 Hawks, 71. The very fact that no such motion was made is strongly corroborative of the presumption that the entry was regularly made with the consent of the parties or their attorneys.

But the defendants insist that even if the memorandum is all right, it is incompetent for the purpose for which it was offered; for the execution of a bond can only be proved by the subscribing witness when there is one, and that the admission or confession of the obligor is not sufficient. As a general rule this proposition is no doubt correct, but there are exceptions. The first relaxation of the rule we have found in this country is in the case of *Hall v. Phelps*, 2 Johns. 451, which was an action on a promissory note. And Justice SPENCER in that case says, "the confession of a party that he gave a note or any instrument precisely identified is as high proof as that derived from a subscribing witness. The notion that those who attest an instrument are agreed upon to be the only witnesses to prove it, is not conformable to the truth of transactions of this kind, and to speak with all possible delicacy, is an absurdity;"

Jones v. Henry.

and in the case of *Henry v. Bishop*, 2 Wend. 575, Chief Justice SAVAGE, while adhering to the general rule, said, it always appeared to him as an absurdity; and in *Fox v. Reil*, 3 Johns. 476, which was an action upon a bond, Chief Justice KENT, speaking for the court, said he concurred in the decision of *Hall v. Phelps*, from a sense of the great inconvenience of the English rule when applied to commercial paper, but that the court was concluded by the ancient and uniform rule, where the defendant has not acknowledged his deed before a competent public officer, or has not expressly agreed to admit it in evidence upon the trial. This is a distinct recognition of the exception when the execution is admitted for the purpose of the trial. In *Abbott v. Plumbe*, Doug. 216, where it was proved that the obligor acknowledged that he owed the debt and it was objected that the subscribing witness ought to have been called, Lord MANSFIELD considered the objection as captious, and that it was a mere technical rule which required the subscribing witness to be produced. And in the case of *Smartle v. Williams*, 1 Salk. 280, the Court of King's Bench held, that the acknowledgment of a deed by the party in a court of record was good evidence of the execution of the deed, and such an acknowledgment estopped the party from relying upon the plea of *non est factum*. Upon these authorities we are of the opinion the admission of the memorandum as evidence was not erroneous.

[Omitting other points.]

There is no error. The judgment of the court below must be affirmed.

Judgment affirmed.

No error.

NOTE BY THE REPORTER. — It has been held that the rule in question is not abrogated by the law making parties competent witnesses, and the testimony of the party executing the instrument cannot be received as a substitute for that of the subscribing witness. *Jones v. Underwood*, 28 Barb. 481. The court said: "No man should be compelled to resort to his adversary for evidence, if he can have a witness who is disinterested." So in *Story v. Lovett*, 1 E. D. Smith, 158, the court said: "The adverse party has an undeniable right to require him who offers the instrument in evidence to call the person who was chosen to attest the fact of the execution, that he may by cross-examination elicit all the attending circumstances. The oath of the grantor, obligor, or mortgagor cannot be substituted." The same doctrine in *Hodnett v. Smith*, 2 Sweeny, 401; *Weigand v. Siebel*, 4 Abt. Ct. App. Dec. 592.

So held in *Kalmes v. Gerrish*, 7 Nev. 81; *Brigham v. Palmer*, 3 Allen, 450. In the latter case the doctrine is put on the grounds that "a fact may be known to the subscribing witness, not within the recollection or knowledge of the obligor, and he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction:" and "when there is a subscribing witness the parties thereby agree that the proof of their

Wharton v. Moore.

handwriting shall be made through their medium." The latter ground was adopted in *Whyman v. Gath*, 8 Exch. 808, where the same doctrine was laid down. Ch. B. POLLOCK, in the latter case, said: "We think the rule of law in question is so inflexible, clear and universal, that we cannot set it aside by any reasoning, however cogent, arising out of the passing of a statute of a subject of evidence, which however strongly its provisions may seem to point to such a conclusion, most certainly never had it in contemplation." The same ground for the rule was assigned in *McMurtrey v. Peebles*, 4 Mon. 40.

The contrary doctrine was held in *Bowling v. Har*, 55 Mo. 448. The court remarked: "It was objected, that as there was a subscribing witness, it was necessary to call him or give some excuse for his absence, and that secondary evidence could not be allowed to prove the execution of the contract. This was formerly unquestionably the law; but since parties have been made competent witnesses it is hard to see how it could be necessary to call a subscribing witness. No subscribing witness could know better than the parties themselves, as to the execution of the contract. The object of requiring a subscribing witness, was to secure the best evidence that was attainable; but the parties to the contract are surely as competent to state the facts, as any subscribing witness. The rule was established when parties were not competent witnesses. Even under this rule the acknowledgment or admission of the parties to the execution of instruments not under seal was held sufficient. *Hall v. Phelps*, 8 Johns. 451; *Henry v. Bishop*, 3 Wend. 575."

WHARTON V. MOORE.

(84 N. C. 479.)

Mortgage — betterments.

One who buys mortgaged premises, without actual knowledge of the mortgage, the mortgage however being recorded, and puts betterments on the premises, cannot have any allowance therefor, unless there is a surplus on foreclosure.

ACTION to determine right to moneys arising on mortgage foreclosure. The head note and opinion show the point.

Gilliman & Gatling, for plaintiff.

George V. Strong and W. H. Pace, for defendant.

ASHE, J. [Omitting statement.] Whatever title Moore and Adams derived through their deed from Russ and wife was subject to the equity of Carter. He had a lien upon the lot as a security for his debt, and the defendants must pay his debt before they can acquire the absolute estate. This then to all intents and purposes established between them the relation of mortgagor and mortgagee.

Having ascertained the relation of the parties to the lot in ques-

Wharton v. Moore.

tion, the next inquiry is, how shall the proceeds of the sale be appropriated? The whole of the lot was sold and did not bring more than enough to satisfy Carter's debt. The land in the unimproved state when Carter received his mortgage was worth only \$250, and improvements were put on it by Moore and Adams after the conveyance to them, which enhanced its value at least \$1,000. Carter's administrator contends that he is entitled to the whole of the proceeds, and Moore and Adams insist that by reason of their improvements they have a right to so much of the proceeds as the lot has been enhanced thereby.

This right to betterments is a doctrine that has gradually grown up in the practice of the courts of equity, and while it has been adopted in many of the States, it is not recognized in others. But it may now be considered as an established principle of equity, that whenever a plaintiff seeks the aid of a court of equity to enforce his title against an innocent person, who has made improvements on land, without notice of a superior title, believing himself to be the absolute owner, aid will be given to him, only upon the terms that he shall make due compensation to such innocent person to the extent of the enhanced value of the premises, by reason of the meliorations or improvements, upon the principle that he who seeks equity must do equity. Story Eq. Jur., § 799; 2 Greenl. on Ev., § 549. But it was only in these cases where the right has been set up by way of defense that the courts have lent their aid. It had not been given to a party seeking affirmative relief, before the case of *Bright v. Boyd*, 1 Story 478, where Judge STORY held, that a plaintiff, after a recovery at law against him of a tract of land by reason of illegality in the proceedings of an administrator to sell, under which he had purchased, could recover by bill in equity the value of lasting improvements put by him on the land. The case of *Mathews v. Davis*, 6 Humph. 324, and *Herring v. Follard*, 4 id. 362, soon followed and were to the same effect, relying upon Judge STORY's decision as authority. But these cases pressed the doctrine further than we have found it carried in any other State, except in this. In the case of *Albea v. Griffin*, 2 Dev. & Bat. Eq. 9, which was a bill filed by the vendee for a specific performance of a contract for the sale of land, and the defense was the act of 1819, avoiding parol contracts for the sale of land, Judge GASTON, giving the opinion of the court, says: "Although payment of the purchase-money, taking possession, and

Wharton v. Moore.

making improvements, will not entitle the vendee to a specific execution of a parol agreement, for the sale of land, yet he has in equity a right to an account of the purchase-money and the value of his improvements, deducting therefrom the annual value during his possession."

This court in several cases has recognized the doctrine of betterments to the extent of the enhanced value of the land, in cases where the contract for the sale of land has been rescinded, or the title has failed by reason of the contract not being in writing. *Wetherell v. Gorman*, 74 N. C. 603 ; *Hill v. Brower*, 76 id. 124 ; *Smith v. Stewart*, 83 id. 406.

But we have been unable to find any case in which the doctrine has been held to apply to mortgages. In our act of 1871-'2, providing a remedy to recover betterments for innocent defendants against whom a recovery may be had in an action in nature of ejectment, it is expressly declared in the act that its provisions shall not apply to any suit brought by a mortgagee against a mortgagor to recover the mortgaged premises. It is very probable the legislature in making the exception had in view the generally admitted principle that the right to betterments is not conceded to mortgagors, for the current of authorities is to the effect that it has no application to them. In 2 Washburn on Real Prop., it is laid down that, "if the mortgagor or any one standing in his place enhances the value of the premises by improvements, they become additional security for the debt, and he can only claim the surplus, if any, upon such sale being made after satisfying the debt."

In *Martin v. Beatty*, 54 Ill. 190, it is held that money expended in improvements upon mortgaged premises by the mortgagor or his grantee subsequent to the mortgage cannot be given a lien prior to that of the mortgagee. And in *Rice v. Dewey*, 54 Barb. 455, it was decided that "where lands sold and conveyed by mortgage are charged with the mortgage debt, improvements that constitute a part of the realty, irrespective of the question by whom made, are equally subject to the lien of the mortgagee as the land upon which they are made."

In Massachusetts it is held that the owner of an equity of redemption is not entitled as against the mortgagee to be allowed for improvements made upon the premises. *Childs v. Dolan*, 5 Allen, 319.

To the same effect are *Union Water Co. v. Murphy*, 22 Cal. 621 ;

Hatch v. Cohen.

McCumber v. Gilman, 15 Ill. 381, and 1 Jones on Mortgages, § 147.

There is no error. Let this be certified to the Superior Court of Wake county that proceedings may be there had in accordance with this opinion.

No error.

Affirmed.

HATCH V. COHEN.

(84 N. C. 602.)

Malicious prosecution — end of original prosecution — nolle prosequi

In an action for maliciously instituting criminal proceedings, the entry of *nolle prosequi* and the discharge of the defendant, upon the request of the complainant, is a sufficient conclusion of such proceedings.*

ACTION for malicious prosecution. The opinion states the case. The plaintiff had judgment below.

Manly, Simmons & Manly, for plaintiff.

W. T. Dortch, W. E. Clarke and Merrimon & Fuller, for defendant.

RUFFIN, J. The plaintiff in this action sues the defendant for having maliciously prosecuted him on a charge of burglary, and on the trial below several exceptions were taken for the defendant who is the appellant, but as only one has been insisted on in this court it is needless to state more of the case than is sufficient to present the point.

In his complaint the plaintiff alleged that after a bill of indictment for burglary had been found against him on his oath and at the instance of the defendant, a *nolle prosequi* had been entered by the solicitor with the consent of the presiding judge and at the express request of the defendant, and thereupon he had been discharged out of custody — all of which was admitted in the answer.

When the case was called for trial, the defendant's counsel moved to dismiss the plaintiff's action upon the ground that a *nolle prosequi* was not such an end to the criminal action against the plaintiff

*To same effect, *Brown v. Randall* (36 Conn. 56), 4 Am. Rep. 35.

Hatch v. Cohen.

as would enable him to maintain his action against the defendant, which motion was denied by the presiding judge and the defendant excepted.

All the authorities agree in saying that in an action like the present one, the plaintiff must allege and prove a legal determination of the original action, but they differ as to whether the entry of a *nolle prosequi* in a criminal prosecution is such a determination of it as will justify the bringing of the other action. In this State that exact point has never been before this court; but as it seems to us, a principle has been settled in some of its decisions, from which by analogy we are enabled to arrive at a conclusion in regard to it. In the case of *Murray v. Lackey*, 2 Murph. 368, the plaintiff had been arrested at the instance of the defendant, upon a charge of perjury, and after a preliminary trial before a justice was recognized for his appearance at court where he attended during the term, but at its expiration was allowed to depart without further security for his appearance, no indictment having been preferred against him. It was held that under these circumstances an action for a malicious prosecution would lie, the failure of the State to send a bill and require other security of the party being equivalent, as it was said, to an order *for his discharge*. And so it was held in the case of *Rice v. Ponder*, 7 Ired. 390, in which the plaintiff had been arrested on the oath of the defendant upon a charge of larceny, and after examination by a justice was held to security for his appearance at court, where he appeared but was allowed to go without further security, no bill having been sent against him, but an entry made on the docket "that the solicitor was of the opinion that the charge could not be sustained," the court observing that it was clear from the memorandum on the docket that "the proceeding against the party was intended and considered to be at an end." From these two cases we learn that although a plaintiff in an action for a malicious prosecution may not have been actually acquitted of the offense originally alleged against him, he may still maintain his action, provided he has been discharged and allowed to go without day in the original action, or if the order of the court has been such as to amount to a discharge.

But it is said that after a *nolle prosequi*, the original prosecution may be resumed and the plaintiff be yet convicted of the offense with which he was charged by the defendant. So it might have been done in both of the instances cited above, and therefore it does

Wittkowski v. Smith.

not appear that this court has (as some other courts have done) adopted that as the test to determine when an action for a malicious prosecution will lie; but rather the fact of the plaintiff's discharge and the intent with which it was allowed; whether or not it was intended to be final.

In the case before us, there can be no doubt as to the plaintiff's discharge from the indictment against him, for that was express, and as it seems to us there can be as little about the intent with which it was done. It is stated in the complaint that the solicitor "after examining all the facts connected with the charge or in any manner concerning the same, by leave of the presiding judge, entered a *nolle prosequi* in the case, and it was then and there ordered by the judge, with the assent of the solicitor, that the plaintiff be *discharged out of custody*," and no part of this is denied in the defendant's answer. Indeed, so far from denying it, he expressly states that he himself "went frequently to the solicitor and requested *that the case against the plaintiff should be dismissed*; and that it was in consequence of such appeals that he was discharged."

Applying to these facts the principles deduced from the cases cited, we cannot see how his honor could have done otherwise than he did, in refusing to dismiss the plaintiff's action. If the plaintiff's action will not lie now, when will it?

Judgment affirmed.

No error.

WITTKOWSKI V. SMITH.

(84 N. C. 671.)

Negotiable instrument — acceptance — place of demand.

A draft being accepted without specifying any place of payment, it is sufficient to present it for payment at the place of its date.

ACTION on an accepted thirty days' draft, dated at Charlotte, but not specifying any place of payment. It was discounted by a bank at Charlotte, and not being paid at maturity, was presented for payment at that bank, and notice of presentment, demand, non-payment and protest was mailed to the drawers at

Wittkowski v. Smith.

their reputed places of residence. It was shown on the trial that the acceptor lived elsewhere, in Virginia. The defendant had judgment below.

C. Dowd and P. H. Walker, for plaintiff.

W. H. Bailey, for defendant.

SMITH, C. J. No place of payment is mentioned in the bill and no agreement as to such place shown by parol, as it was competent to show if any such agreement existed, under the ruling of Chief Justice MARSHALL, in *Brent's Executors v. Bank of Metropolis*, 1 Pet. 92, and we have no other guide than that furnished in the writing itself. It was drawn and accepted on the same day, and so far as appears, at the same place. The inference to be drawn from an inspection of the instrument is that funds were there to be provided to meet the debt in the absence of evidence of any contrary understanding. Had it been intended that it should be paid elsewhere, it must be assumed it would be so expressed upon its face, or be the subject of agreement between the parties. "The place of date," remarks a recent author, speaking of promissory notes, made negotiable like bills of exchange and governed by the same rules when not controlled by statute, "is *prima facie* evidence that it is the place of the maker's residence and place of business, and it is sufficient, we should say, to charge an indorsee, to have the note in that place at the time of maturity, and to make proper inquiry after the place of the maker's residence or place of business, provided that the holder does not know that his residence is elsewhere." 1 Dan. Neg. Inst., § 640. Or it may be added, when he does not know where it is.

"When the bill or note is made on terms payable in a city, without specification of a particular place, and the acceptor or maker has no residence or place of business there, it will certainly be sufficient to charge the drawer or indorser, if the holder have the bill or note in the city at maturity, ready to be presented and delivered up, if the maker or acceptor should appear." Id.

In *Meyer v. Hibscher*, 47 N. Y. 270, FOLGER, J., thus speaks of a note dated at a place and payable generally: "In such case the note must be presented and payment asked for at the place of business therein of the maker, if he has one, and if he has no place

Bryson v. Lucas.

of business, then at his place of residence. And if he neither have place of business, nor residence, then if the holder of the note is at the place where it is in general made payable, on the day of payment with the note, ready to receive payment, it is sufficient to constitute a presentment and demand."

As it was the undertaking of Billings, whose obligation was absolute, to provide and have in Charlotte the necessary funds to take up his acceptance when it matured, in which he wholly failed, and the bill then went to protest, of which notice was given to the defendants who drew the bill, their liability became fixed and it was their duty to look out for protection against the impending insolvency of the principal debtor.

No point is made as to the sufficiency of the notice of the non-payment, and in our opinion his honor erred in holding the demand, upon which the protest was made, insufficient, and in setting aside the verdict and directing a nonsuit. The judgment below must be reversed and judgment rendered upon the verdict for the plaintiff, and it is so ordered.

Judgment reversed.

Error.

BRYSON V. LUCAS.

(84 N. C. 680.)

Agency — execution of bond.

A bond phrased, "I promise to pay," etc., and not mentioning the obligor's name in the body, was executed by an agent as follows: "Witness my hand and seal, H. S. Lucas [seal], for Charles Callender, president of the Chester Mica and Porcelain Co." *Held*, that the agent was individually liable on it.*

ACTION on a bond. The head note sufficiently states the case. The defendant had judgment below.

Gray & Stamps, for plaintiff.

Messrs. Read, Busbee & Busbee, for defendant.

SMITH, C. J. The record presents the sole question, whether

* See *McClure v. Herring* (70 Mo. 18), 35 Am. Rep. 404.

Bryson v. Lucas.

the instrument set out in the complaint is the bond of the defendant on which he is personally liable.

It is settled by adjudications in this State that a contract made in the name of another by one professing but not possessing authority to bind, is the contract of neither, yet the former may be liable upon the contract implied in receiving the consideration, and the latter in damages for the false and fraudulent representation of such agency. *Potts v. Lazarus*, 2 Car. Law, 83; *Delins v. Cawthorne*, 2 Dev. 90. And the principle extends to a partnership, one of whose members without legal authority undertakes to execute a note under seal in the name of the firm. *Fronebarger v. Henry*, 6 Jones, 548; *Fisher v. Pender*, 7 id. 483.

It is manifest that this is not the bond of the company, nor of its chief officer, not only for a defect of power in the agent to make it, but for the further reason that in form it does not undertake to impose an obligation on either unless that effect follows the use of the words superadded to the signature. Undoubtedly a promissory note without seal thus signed would be construed to create a direct contract with the party on whose behalf and for whose benefit it thus appears to have been made. It is so held in *Bank of Cape Fear v. Wright*, 3 Jones, 376; *McCall v. Clayton*, Busb. 422, and numerous cases cited in Story on Agency, § 144. But it is otherwise when the contract is authenticated by seal, and it then becomes the deed of the party to whose name the seal is annexed, although described as agent, or is an absolute nullity, binding no one.

In our opinion this writing is in effect as well as in form the personal bond of the defendant, notwithstanding the mode of its execution and signature, and this proposition is fully supported by authority. Nowhere in the body of the note is the name of any supposed principal mentioned or referred to. Its language is entirely personal — “I promise to pay Albert S. Bryson” — and it concludes with the words, “witness *my hand and seal*,” and then the seal is affixed to the name of the promisor, the defendant. While the consideration recited is the sale of a tract of land of which this is a part of the purchase-money, it is not stated to whom the sale was made, and this only appears from the plaintiff's covenant referred to as of the same date, and which when produced bears an earlier date. But waiving the discrepancy in the bonds, there is no incongruity in the defendant's assuming a personal obligation

for the payment of the purchase-money for the lands sold and to be conveyed to another, nor does this fact change or impair the individual liability incurred. To substantiate this construction of the covenant, we shall refer to some decided cases, called to our attention in the well-considered brief of the plaintiff's counsel.

In *Combe's* case, 5 Coke, 135, it was resolved by the court, "that when any one has authority as attorney to do any act, he ought to do it in his name who gives the authority, for he appoints the attorney to be in his place, and to represent his person, and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority."

Quoting and approving the doctrine announced, SAVAGE, J., remarks: "All the subsequent cases agree in the law as thus laid down by Coke. There is no contradiction on the subject." *Stone v. Wood*, 7 Cow. 453. To the same purport is *Stackpole v. Arnold*, 11 Mass. 27.

"I accede to the doctrine in all the cases cited," is the language of GROSE, J., in *Wilkes v. Back*, 2 East., 142, "that an attorney must execute his power in the name of his principal, *and not in his own name.*"

In *Appleton v. Binks*, 5 East, 147, the defendant for himself, his heirs, executors, etc., on the part and behalf of the said Lord Viscount Rokeby, did thereby covenant, etc., and the consideration was received by Lord Rokeby. The court held the covenant to be personal, and say: "It is impossible to contend that where one covenants for another he is not bound by it, the covenant being in his own name for himself and his heirs." See, also, *Dewitt v. Walton*, 5 Seld. 571.

In *Tippetts v. Walker*, 4 Mass. 595, the agreement was entered into by the defendants, a committee appointed by the directors of the Middlesex Turnpike company, and the court say: "To the agreement the defendants have not (if they had legal authority) put the seals of the directors or the seal of the corporation. It is therefore their deed, and if it were not their covenant, it is not the covenant of any person or corporation, and the *apparent interest of the plaintiff to have his payments secured by a covenant will be defeated.*"

In *Duvall v. Craig*, 2 Wheat. 45, Judge STORY says: "An agent or executor who covenants in his own name and yet describes himself as agent or executor, is personally liable for the obvious reason

Bryson v. Lucas.

that the one has no principal to bind, and the other substitutes himself for his principal." In the note to this case it is added: "When a person acts as agent for another, if he executes a deed for his principal *and does not mean to bind himself personally*, he should take care to execute the deed in the name of his principal, and state the name of his principal, only, in the body of the deed."

In the courts of New York the doctrine has been repeatedly and emphatically announced. In *Townsend v. Hubbard*, 4 Hill, 351, the articles of agreement were between Isaiah Townsend and certain others named, "by Harvey Baldwin their attorney of the first part, and the second party" and concluded: "In witness whereof the said Harvey Baldwin as attorney of the party of the first part, and the said parties of the second part, have hereunto set their hands and seals," and the name of the attorney was subscribed thereto with his seal, and the court declared the covenant to be personal, and say: "In the case of a sealed instrument executed by an attorney, duly authorized by a person, under seal, no particular form of words is necessary to render it valid and binding upon the principal, provided it appears upon the face of the instrument that it was intended to be executed as the deed of the principal, and that the seal affixed to the instrument is *his seal* and not *the seal of the attorney or agent merely*."

So GARDINER, C. J., lays down the rule in similar words: "When a party is sought to be charged upon an express contract, it must at least appear upon the *face of the instrument* that the agent undertook to bind him as principal." *Dewitt v. Walton*, 5 Seld. 571. See also, *Spencer v. Field*, 10 Wend. 87.

In *Quigley v. DeHaas*, 82 Penn. St. 267, the defendants in error entered into a contract describing themselves as "representing the Clinton and Potter County Navigation Company of the first part," with a concluding clause — "In witness whereof we have hereunto set our hands and seals," and affixing their individual names and seals. They were declared personally bound, and this language is used by the court: "The action was well brought against Quigley and Bailey. Though they contract as agents for the benefit of the Navigation Company, yet they do so under their own individual seals and hence become individually liable." In harmony with these views is the doctrine laid down by Judge STORY and Chancellor KENT. Story on Agency, § 153 *et seq.*; 2 Kent Com. 931.

Bryson v. Lucas.

In *Whitehead v. Reddick*, 12 Ired. 95, the body of the contract as well as the mode of subscription shows that the covenant was that of the "Albemarle Swamp Land Company," for whom the plaintiff was acting, and the subject of the contract was the making shingles on the land of the company. The language employed in describing the parties is: "William B. Whitehead, for and on behalf of the Albemarle Swamp Land Company of the one part, and Burwell Reddick and Willis S. Reddick on the other part, do enter into the following agreement, * * * and in conclusion — In witness whereof William B. Whitehead, for and on behalf of the party of the first part, *being the Albemarle Swamp Land Company, etc.*, thus pointing out the principal to be bound, and such was the construction of the contract.

In *Oliver v. Dix*, 1 Dev. & Bat. Eq. 158, the bond was under seal and signed, "Thomas Dix, acting for James Dix," and RUFFIN, C. J., declares that "it is unquestionably the bond of Thomas and not of James. The former seals it and he speaks in it throughout, and the latter not at all." The same eminent judge, referring to a deed similarly executed in *Redmon v. Coffin*, 2 Dev. Eq. 437, lays down the rule in determining the liability of the party: "It is not material in what form the deed be signed, whether A. B. by C. D., or C. D. for A. B., *provided it appear in the deed* and by the execution that it is the deed of the principal. But that must appear, and the cases cited put that beyond doubt" — citing many cases.

This review leads to the conclusion that the bond now in suit imposes a personal obligation on the defendant, and not on the company nor on its president, neither of whom is named in the body of the instrument, to pay the money specified and due under it. There is therefore error in the ruling of the court and the judgment of nonsuit must be set aside and a new trial awarded. This will be certified.

Venire de novo.

Error.

Pegram v. Charlotte, Augusta and Columbia Railroad Company.

**PEGRAM V. CHARLOTTE, COLUMBIA AND AUGUSTA RAILROAD
COMPANY.**

(84 N. C. 696.)

Agency — contract — fiduciary relation.

A railway company, upon the application of one of its station agents, agreed to furnish an excursion train for a third party, as the correspondence indicated. Discovering that the train was really intended for the benefit of the agent, they refused to furnish it. *Held*, that they were not liable in damages to the agent.

ACTION of damages for breach of contract. The opinion states the case. The plaintiff had judgment below.

Shipp & Bailey, for plaintiff.

Wilson & Son, for defendant.

SMITH, C. J. The action is for damages for breach of a contract alleged to have been entered into by the defendant for the hire of two excursion trains to be run over the railroad, one between Charlotte and Augusta, the other between Charlotte and Columbia, in the month of May, 1875. The answer explains the correspondence between the plaintiff and the general superintendent of the company, in whom was vested the authority to contract for the running of trains over the road, denies the existence of the alleged contract, and insists that if made, it was procured through circumvention and fraud practiced by the plaintiff and is void. No specific questions of fact, growing out of the opposing allegations, were framed, but the entire controversy was submitted to the jury who find "the issues in favor of the plaintiff and assess his damages at seven hundred and seventy-five dollars." On the trial the plaintiff, testifying for himself, stated that during the year 1875 he was station agent for the defendant company at Charlotte, and had the supervision of the depot and business at that place; that he addressed to the general passenger and freight agent of the company at Columbia two letters of same date and in the following words:

Pegram v. Charlotte, Augusta and Columbia Railroad Company.

[1] "C., C. & A. R. R., CHARLOTTE AGENCY, }
March 1st, 1875. }

A. POPE, Esq., G. F. A., Columbia:

Ferry Morehead, colored, wants to know price of an excursion train of five coaches and one baggage car, Augusta to Charlotte and back; leaving Augusta 19th May, and returning, leave Charlotte 9 A. M., 21st May, 1875.

Respectfully,

W. W. PEGRAM, Agent."

[2] "Please let me know the lowest price for engine, five coaches and baggage car, Columbia to Charlotte and back with privilege of running between Charlotte and the fair grounds during the day, leaving Columbia five or six o'clock A. M., 20th May, and returning, leave Charlotte 12:30 A. M., 21st of May." (Written at Charlotte Agency and signed by W. W. Pegram.)

That in reply the said Pope wrote to the plaintiff that the trains from Augusta to Charlotte could be forwarded for \$400, and from Charlotte to Columbia for \$250; that the plaintiff on March 18th sent a telegraphic message to Pope that he thought both trains would be taken, and asking him not to make any other arrangement until he should hear further, and soon after he wrote to Pope in the following terms, from the Charlotte Agency under date of March 25th, 1875:

"Both trains of which I wrote you, about 1st March, have been taken. You will please arrange accordingly. The one for Columbia should be made up of the very best cars, as it is intended for whites entirely." (Signed by W. W. Pegram, Agent.)

This was the evidence offered in support of the contract, and the plaintiff further testified that it was made in contemplation of the intended commemoration of the centennial of the Mecklenburg declaration of May 20th, which was expected to attract and did in fact attract large numbers to Charlotte, and from the refusal to supply the trains the plaintiff suffered a large loss in profits. The testimony of the general superintendent, who had authority to enter into such arrangements, was in substance that he was wholly ignorant of the approaching celebration and of the increased travel in consequence about that date, and no information was given him by the plaintiff or others, and that as soon as he discovered that the plaintiff was attempting to procure trains for his own use, he promptly refused to let them go. A series of instructions was

Pegram v. Augusta, Charlotte and Columbia Railroad Company.

asked for the appellant, unnecessary to be set out in detail, but which are embodied in these propositions :

1. The plaintiff's agency and its consequent fiduciary obligations incapacitated him from making a contract with the company, creating adverse relations between them within the scope of such agency.

2. A contract thus obtained without a full disclosure of all matters affecting the interests of his principal and known to the agent would be fraudulent and void.

3. The plaintiff was bound to look after and promote the interests of the company, and could not without its full knowledge of all the material facts by means of the attempted contract advance his own at the expense and to the injury of his employer.

4. The burden of showing that the company possessed the necessary information and his own good faith devolved upon the plaintiff.

5. There was no evidence the company had such information.

6. The measure of damages in case of recovery is the excess above the contract price, of the earnings of the road in its ordinary runnings and not the extraordinary occasion to which the contract had reference.

The instructions were not given and in their place the following : The plaintiff was bound to communicate to the superior agent with whom he was dealing all the information he possessed which was material to the interests of their common principal in determining upon the proposed contract, and that he was acting for himself, and he must have acted with the utmost good faith of which proof must come from him. It was not necessary however for him to give information of facts which he might reasonably assume to be known to all and were known to his superior agent—as for illustration, that the 4th day of July is a National holiday. The Mecklenburg celebration is not of the kind of which notice is presumed. If this centennial celebration was of such general notoriety as to be known to Pope or the general agents of the company, having charge of such contracts, and was in fact so known to them, then the failure of the plaintiff to convey this information would not defeat his action. This he must show. The defendant, if uninformed by the plaintiff or otherwise of the contemplated proceedings in May, and if the plaintiff at the date of the contract was acting as its agent, could terminate it and would not become liable. The dam-

Pegram v. Augusta, Charlotte and Columbia Railroad Company.

ages, if any, are such as may be reasonably supposed to have been contemplated by the parties at the time as the probable results of the breach of the contract.

The correspondence between the plaintiff, the subordinate, and Pope, the superior agent, both in the service of a common principal, furnishes the evidence of the contract on which the action is based. It does not show upon its face that the plaintiff was seeking to enter into a personal contract for his own individual advantage with his employer. His first letter is one of inquiry for Ferry Morehead who "wants to know price of excursion train," has the usual agency heading and is signed by himself as "agent." The second, bearing the same date, and the same general impress, except that the signature is without the "*agency*," would reasonably be associated with the other in its purposes and be interpreted in the same way. In neither is there any indication of a direct personal interest in the subject of the inquiry on the part of the writer. They would both most naturally be understood as a communication between the two agents of the same company, the one asking and the other furnishing information for some outside party. The telegraphic message is in keeping with the letters — the plaintiff saying to his superior on the 18th of March that "he thought that both trains would be taken" and asking that no other arrangement be made until he heard further — language implying that the acceptance of the proposition depended on the will of another, not on that of the writer. The letter of acceptance is of similar import, declaring *that both trains have been taken*, as if the act had been consummated between himself and another, and he was now communicating the fact to the superior agent. Nowhere does the plaintiff profess or appear to be acting for himself and for his personal benefit, and so the matter seems to have been understood by Pope, who testifies that as soon as it came to his knowledge that the centennial celebration was to come off and that the "plaintiff had procured a train for his own use and benefit * * * he refused to allow the plaintiff to have the trains." The several inter-communications do not disclose any common understanding — that *aggregatio mentium* — the essential element in a valid agreement. Pope seems to have received the plaintiff's message (and this interpretation is warranted by the terms used and their relations as employees in the same general service) as conveyed in the interest of the company, and not for the advancement of his own profit; and

State v. Jenkins.

his undiscovered intention, even in the absence of any third party, cannot constitute a contract with his principal any more than with Pope himself. The existence of a contract depends upon a mutual agreement, and its binding force results not from what either intended but what both concurred in. *Brunhild v. Freeman*, 77 N. C., 128; *Pendleton v. Jones*, 82 id. 249. The point is not distinctly presented in the instructions asked and refused, but it is in our opinion substantially involved in the first in connection with the others, that the plaintiff could not from his fiduciary relations toward the company enter into a binding contract with it. This was in effect a request that the judge charge the jury that no legal contract was created between the plaintiff and his employer, and there was error in refusing to so charge. The law in harmony with sound morals refuses its sanction to any measure, though assuming the form of contract, procured by a fiduciary from his principal in violation of the trusts reposed in him, and to the injury of the latter, at least unless such principal is fully advised of all the circumstances and knows at the time that he is dealing with one, then divested of his agency, and acting in an adversary and independent capacity. The cases and authorities cited for the appellant fully support this doctrine. Story Ag., § 211 *et seq.*; *Ringo v. Binns*, 10 Pet. 269; *Dunn v. English*, 10 Moak, 846. For the error pointed out there must be a new trial.

Venire de novo.

Error.

STATE V. JENKINS.

(84 N. C. 812.)

Criminal law — trial — presence of prisoner at verdict — discharge.

The prisoner in a case of felony not capital is entitled to be present when the jury bring in their verdict; this right cannot be waived by his counsel; but a verdict in his absence, the reception of which is assented to by his counsel, does not entitle him to a discharge, but only to a new trial.*

CONVICTION of burning a mill, a crime punishable by imprisonment. The opinion states the facts.

* *Contra*: *Cook v. State* (60 Ala. 30), 31 Am. Rep. 31.

Attorney-General, for State.

G. N. Folk, for defendant.

RUFFIN, J. There were many exceptions taken by the prisoner on the trial below, but it is necessary that we should notice but one, which is decisive of his case, and clearly entitles him to a new trial.

The judge below after finishing his charge late in the afternoon, committed the case to the jury, and being about to leave the court room, inquired of the prisoner's counsel if the clerk of the court might receive the verdict, and the counsel not assenting, no instructions to that effect were given. About eleven o'clock at night the jury having agreed upon their verdict, of their own head and without any such direction from any one, came to the judge's room, and there in the presence of the prisoner's counsel and with their assent, delivered their verdict of guilty to the judge in the absence of the prisoner, which verdict the judge caused to be immediately recorded upon the proper docket and read to the jury, who assented thereto and were allowed to separate. At the meeting of the court on the next morning, one of the prisoner's counsel objected to the manner in which the verdict had been rendered in the absence of the prisoner, and moved for his discharge upon the ground that the verdict so taken could have no validity, and that after such a separation of the jury as had occurred, the prisoner could not be again put upon trial for the same offense.

In every criminal prosecution it is the *right* of the accused to be informed of the accusation against him and to confront his accusers. In capital trials this *right* cannot be waived by the prisoner, but it is the duty of the court to see that he is actually present at each and every step taken in the progress of the trial. *State v. Blackwelder*, Phil. 38; *State v. Craton*, 6 Ired. 164. In prosecutions for lesser felonies, the accused has exactly the same rights. *State v. Bray*, 67 N. C. 283. Whether the right can be waived in such cases is a point about which the authorities seem to be still divided — some holding his actual presence to be necessary during the entire trial; and others, that being a right personal to the accused and established for his benefit, it might be waived by him.

It is not necessary that we should decide the point in this case, as we hold that the prisoner was deprived of this right, or rather of

State v. Jenkins.

the opportunity to exercise it, by the manner in which the verdict was allowed to be taken.

The record does not disclose the condition of the prisoner during the time the jury were deliberating upon their verdict — whether committed to jail or not — but it is perfectly manifest that the action of the jury in coming to his room for the purpose of delivering their verdict, was a surprise to the judge himself; that it was their own act done of their own accord. As then it is not to be supposed that any communications had passed between the jury and the prisoner, we are forced to conclude, that like the judge, he was not informed of this purpose of the jury, and therefore could not if he wished have attended the room of the judge; and therein he lost that right which the law and Constitution intended he should enjoy.

The fact that the counsel for the accused were present and assented to the rendition of the verdict at that place, was well calculated, though we presume not so intended, to throw his honor off his guard and cause him to forget for the moment that this right of the prisoner to be present at all the stages of his trial, was one that counsel could not waive. Doubtless the counsel themselves, for the time, overlooked it, and were thereby led to yield an assent beyond their power to bind the prisoner.

In the notes to the case of *Sperry v. Commonwealth*, 1 Bennett & Heard L. C. C., 433, it is declared that this right of a prisoner to be present throughout his trial is inalienable, and one that cannot be waived by counsel, and a number of cases are cited in support of the position. And as we concur therein, we hold that the proceedings in the court below resulted in a mistrial to the prisoner. We cannot however grant the prisoner's discharge as prayed for, being of the opinion that the facts as set out by the court in the record do not work a bar to his being tried again. It does not follow, say Bennett & Heard, 438, that because a verdict is rendered in the absence of a prisoner, he is entitled to his discharge; it is merely a mistrial, and the verdict should be set aside and the prisoner tried again.

In *State v. Bullock*, 63 N. C. 570, this court say it was never supposed that the rule that a jury sworn and charged cannot be discharged without the consent of the prisoner, was ever applied to any but a capital case. In *State v. Johnson*, 75 N. C. 123; 22 Am. Rep. 666, was held that in the trials for offenses less than capital, the presiding

State v. Jenkins.

judge should assume the responsibility of ordering a mistrial whenever he believes it proper to do so in furtherance of justice, and that his discretion in such particulars was not the subject of review. And in the very recent case of *State v. Bass*, 82 N. C. 570, Judge DILLARD very justly remarks that while many of our judges, in delivering their opinions in capital cases upon the discretion allowed to be exercised by the presiding judge in regard to discharging juries, have used language sufficiently broad to include lesser felonies within the same restricted rule, a more careful examination of the cases would disclose the fact that they stood upon the same level with misdemeanors in this particular; and he refers to a number of cases in which it had been held that the exercise of such a discretion was not the subject of review here. In *Bray's case, supra*, the prisoner was ordered to be tried again.

We therefore overrule the motion of the prisoner to be discharged and direct that this be certified to the Superior Court of Catawba county to the end that further proceedings may be had according to law.

Venire de novo.

Error.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

MEARS V. HUMBOLDT INSURANCE COMPANY.

(92 Penn. St. 16.)

Insurance — fire — “keep, have or use” — benzine for cleaning — “burning fluid or chemical oils.”

A fire insurance policy on a distillery forbade the assured to “keep or have” on the premises “petroleum, naphtha, benzine, benzole, gasoline, benzine-varnish,” etc., or to keep, have or use camphene, spirit gas, or any burning fluid or chemical oils,” etc. *Held*, that this did not prohibit temporary taking of benzine on the premises for the cleaning of machinery, and the use of the same therefor. Also *held*, that whether benzine was a “burning fluid or chemical oil” was a question of fact. (*See note, p. 650.*)

ACTION on a policy of fire insurance. The opinion states the case. The defendant had judgment below.

Weir & Gibson and J. Dunbar, for plaintiff in error.

M. W. Acheson and S. C. Schoyer, for defendant in error.

PAXSON, J. The first assignment of error relates to the use of benzine upon the insured premises. It was contended that the court erred in instructing the jury in answer to the defendant’s second point, that if Mears, the assured, purchased from eight to

Mears v. Humboldt Insurance Company.

ten gallons of benzine, and used nearly the whole of it in cleaning the engine, boilers and machinery of the distillery, and such use extended over a period of about two weeks, there was a violation of one of the conditions of the policy in suit and avoids the same.

The condition in the policy referred to is as follows: "Or if the assured shall *keep or have*, in any place on the insured premises where this policy may apply, petroleum, naphtha, benzine, benzole, gasoline, benzine-varnish, or any product in whole or in part of either; or gunpowder, fireworks, nitro-glycerine, phosphorus, salt-petre, nitrate of soda; or keep, have or ~~use~~ camphene, spirit gas or any burning fluid or chemical oils, without written permission in this policy, then and in every such case, this policy shall be void."

It will be observed that in the first portion of this condition the provision is that the assured shall not keep or have" any of the enumerated articles upon the insured premises, while in the latter portion, the "use" of certain other articles is prohibited, in addition to the restriction contained in the first.

The words "keep or have," as applied to the articles first enumerated, evidently were intended to prevent a storage of the prohibited articles upon the premises, either permanently or habitually. While the words are used in the disjunctive, they are evidently synonymous, and signify to retain in possession. It would be straining a point to say that bringing a prohibited article upon the premises upon a single occasion, and for the sole purpose of cleaning machinery, was keeping or having it there within the meaning of the policy. The evidence shows, and it is not denied, that the can of benzine used for the purpose above stated was not kept on the insured premises during the period of its use, but was stored in a bonded warehouse, fifty or sixty feet distant. The witness, William Jacobs, who cleaned the machinery, got it from the warehouse from time to time as he needed it.

The assured did not keep or have benzine upon the insured premises within any reasonable view of the meaning of the policy. But it is said he used it there, and that this avoids the policy. The ~~use~~ of benzine is not prohibited in terms. If prohibited at all it must be because benzine comes within the description of burning fluid or chemical oils. We must ascertain the meaning of these general words, used in the latter portion of the condition of the policy, by referring to the preceding special words. Under this construction the words burning fluids or chemical oils must be

Mears v. Humboldt Insurance Company.

held to mean only such burning fluids and chemical oils as are in their nature like camphene or spirit gas. This was the construction placed upon the identical words in *Wheeler v. American Central Insurance Company*, 6 Mo. App. 235. The same rule is laid down in *Wood v. Northwestern Ins. Co.*, 46 N. Y. 421; *Morse v. Buffalo Fire and Marine Ins. Co.*, 30 Wis. 534; s. c., 11 Am. Rep. 587; and *Willis v. Hanover and Germania Fire Ins. Co.*, 79 N. C. 285.

There was no proof that benzine was of like nature with camphene or spirit gas. It is not a matter of which the court will take judicial notice. It is a question of fact, to be found by a jury upon evidence. See *Wood v. Northwestern Ins. Co.* and *Morse v. Buffalo Fire, etc., Co.*, *supra*.

We are not disposed to give the word "use" in this policy the narrow construction claimed for it. It must have a reasonable interpretation, such as was probably contemplated by the parties at the time the contract was entered into. Nearly every policy of insurance issued at the present time contains this condition, or a similar one. What is intended to be prohibited is the habitual use of such articles, not their exceptional use upon some emergency. The strict rule claimed by the defendants would prevent the assured from painting his house or cleaning his furniture, as it would be difficult to do either without using some of the prohibited articles. If the company intended the condition to cover such exceptional uses, it ought to have been plainly expressed, and probably would have been. That any one would knowingly accept a policy with such a clause is not probable. We are not without abundant authority upon this point. See *Dobson v. Sotheby, M. & M.* 90; *Shaw v. Robberds*, 6 Ad. & E. 75; *Grant v. Howard Ins. Co.*, 5 Hill, 10; *Van Valkenburgh v. Ins. Co.*, 70 N. Y. 605; *Franklin Ins. Co. v. Chicago Ice Co.*, 36 Md. 102; s. c., 11 Am. Rep. 469; *Raferty v. Ins. Co.*, 29 Me. 97; *O'Neil v. Buffalo Fire Ins. Co.*, 3 Comst. 122. The case of *Birmingham Fire Ins. Co. v. Kroegher*, 83 Penn. St. 64; s. c., 24 Am. Rep. 147, cited by defendants, does not apply. In that case the assured kept a barrel of petroleum for sale on the premises covered by the policy.

As bearing upon this point, it is proper to observe that permission to make repairs was indorsed upon the policy. While no point was apparently made of this in the court below, and we would not therefore reverse for this reason, the fact is entitled to weight in considering this question. The permission to repair the machinery

Mears v. Humboldt Insurance Company.

carried with it the right to use such means as might be necessary for that purpose.

The second assignment also refers to keeping benzine upon the premises, and is covered by what has already been said. The remaining assignments relate to the use of carbon oil. It was proved that a small quantity had been used at the same time as the benzine, in cleaning the machinery. It is sufficient to say that carbon oil is not among the prohibited articles. It is not named in the condition. If it was of the same nature as camphene and spirit gas, or other enumerated articles, it was not shown to be so, and the court cannot take judicial notice of it. This principle has already been sufficiently referred to.

All of the assignments of error are sustained. Judgment reversed and a *venire facias de novo* awarded.

Judgment reversed.

NOTE BY THE REPORTER.—See *Williams v. Fireman's Fund Ins. Co.*, 51 N. Y. 509; s. c. 13 Am. Rep. 620; *Hall v. Insurance Co.*, 58 N. Y. 202; s. c., 17 Am. Rep. 265; *Matson v. Farm Buildings Ins. Co.*, 73 N. Y. 310; s. c., 29 Am. Rep. 149; also see note, 24 Am. Rep. 150.

In *Putnam v. Commonwealth Insurance Co.*, U. S. Circuit Court, Northern District of New York, Nov. 1880, the policy provided: "If in said premises there be kept petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or there be kept or used therein camphene, spirit gas or any burning fluid, or any chemical oils, without written permission in this policy, then, and in every such case, this policy shall become void." Held, such provision did not forbid the use of naphtha upon the insured premises for the purposes of illumination. It also provided that "if during this insurance the above-mentioned premises shall be used for any trade, business or vocation, or for storing, using or vending therein any of the articles, goods or merchandise denominated hazardous or extra hazardous or specially hazardous, * * * printed on the back of this policy, then and from thenceforth, so long as the same shall be so appropriated, applied or used, this policy shall cease and be of no force or effect." Held, that "burning fluid" did not necessarily mean any fluid that would burn, when "burning fluid" was classed as "specially hazardous" under such provision. Held, further, that the policy was only suspended under such clause while the forbidden use of naphtha continued, and that it revived when such use ceased. Per BLATCHFORD, Circ. J.

Kerosene is not an "inflammable fluid," within a prohibition in an insurance policy against the use, as lights, of "camphene, spirit gas or burning fluid, phosphene, or any other inflammable fluid." *Wood v. N. W. Ins. Co.*, 46 N. Y. 421. The court said: "The defendants ask us to take judicial notice of its qualities, and that it is in its nature like those. If we do this, we are to know that they are not only so slowly inflammable as to give harmless light by their gradual combustion, but that they are also suddenly explosive, and thus dangerous and harmful. It is this last characteristic, inflammability, which is warranted against." "Nor do we know that judicial notice may be taken that in all cases the article of kerosene is explosive." So in *Mark v. Nat. F. Ins. Co.*, 24 Hun, 509, it was held not necessarily to be, within a similar provision in an insurance policy, a "burning fluid." The court said: "Burning fluid cannot mean every fluid that will burn. Whale oil will burn." Kerosene is a "rock or earth oil." *Buchanan v. Exchange F. Ins. Co.*, 61 N. Y. 28. The court said: "Kerosene is not petroleum. It is made from the latter by a process of distillation and refinement. But it is a rock or earth oil. If it is not, I am unable to classify it."

Whether alcohol is within the description, "camphene, benzine, or any explosive," is a

 Pennsylvania Railroad Company v. Langdon.

question of fact. Whether alcohol is an "explosive," "depends probably upon circumstances, as its strength, exposure, etc." *Wills v. Germania Ins. Co.*, 79 N. C. 285.

In *Carrigan v. Lycoming Ins. Co.* 58 Vt. 418, the policy insured a "stock in trade consisting principally of groceries, provisions, drugs and medicines, fancy goods and such other merchandise as is usually kept in a country store, including wines and liquors." *Held*, that whether benzine is a "drug" was a question of fact. The court said: "Webster defines a drug as including any mineral substance used in chemical operations, and the court cannot say that as matter of law benzine is not included in that term."

In *Niagara Fire Ins. Co. v. DeGraff*, 18 Mich. 124, it was held a question of fact whether wines and liquors are "groceries."

 PENNSYLVANIA RAILROAD COMPANY V. LANGDON.

(92 Penn. St. 21.)

Carrier — of passengers — negligence, contributory — passenger injured while riding in baggage car.

A passenger who voluntarily rides in a baggage car, by permission of the conductor, but against the rules of the railroad conspicuously posted in that car, and is injured in consequence of riding there, cannot recover from the railroad company on the ground of its negligence.

ACTION of damages for death occasioned by negligence. The opinion states the facts. The plaintiff had judgment below.

Hampton and Dalzell, for plaintiff in error.

Barton & Sons, for defendants in error.

PAXSON, J. There are certain facts in this case which are not disputed. Stephen Langdon, the deceased, to recover damages for whose death this action was brought, was an employee of the company defendant, but was not engaged upon the Western Pennsylvania Railroad when the accident occurred. His position was that of night inspector of locomotives at the outer depot of the Pennsylvania railroad, in the city of Pittsburg. The depot had been burned by the rioters the day before the accident occurred. He lived upon the line of the Western Pennsylvania Railroad, a few miles out of the city, and was in the habit of riding to and from his home daily on said road. He travelled upon a commutation ticket, such as is usually sold to passengers. At the time of the accident, he was riding in the baggage-car, in violation of the rules of the

Pennsylvania Railroad Company v. Langdon.

company. Said rules were conspicuously posted in the baggage-car. The particular rule in question is as follows: "They (the trainmen) must see that passengers are properly seated, and will not allow them to stand on the platforms of the cars, nor ride in the baggage nor mail-cars. Conductors and brakemen are instructed to strictly enforce this rule, and it is expected that passengers will cheerfully comply, as the rule is one intended for their own safety, it being particularly dangerous for passengers to be on platforms as trains approach stations." Whilst Langdon was sitting in the baggage-car, and after the train had left Sharpsburg, it collided with the mail-train, injuring him so severely that his death occurred within a few hours thereafter. Had he been in the smoking-car, or in any of the passenger-cars he would not have been injured. After the accident he stated to some of the witnesses, that if he had not gone into the baggage-car he would not have been hurt.

The right of a railroad company to make reasonable rules for its own protection, and for the safety and convenience of passengers, has been repeatedly recognized. *Sullivan v. Phila. R.R. Co.*, 6 Casey, 234; *Powell v. Penn. R. R. Co.*, 32 Penn. St. 414; *West Chester & Phila. R. R. Co. v. Miles*, 5 P. F. Smith, 209; *Pitts. & Conn. R. R. Co. v. McClurg*, 6 id. 294; *Cent. R. R. Co. v. Green*, 5 Norris, 421; *O'Donnell v. Allegheny Valley R. R. Co.*, 9 P. F. Smith, 239. Such companies are held, and very properly, to a strict measure of responsibility in cases of injuries to passengers. It is not unreasonable that they should have the right to require passengers to observe such proper regulations, as are essential to their own safety. With all the care such corporations can exercise in the perfection of their road-bed and machinery, and in the selection of their servants, accidents involving injuries and loss of life will frequently occur. This must continue to be the case so long as iron and wood are destructible, and dependence is placed upon the fidelity, the vigilance, and the judgment of servants. A misplaced switch or an inaccurately worded telegram may send a train to destruction. In such and other like cases, the company is liable to the party injured. The practical impossibility of avoiding all accidents by rail furnishes no good reason why such corporations shall not respond in damages for the injuries caused by the negligence of their servants, when and so often as the same occurs. Such being the measure of their responsibility, may they protect themselves so far as to require passengers to con-

Pennsylvania Railroad Company v. Langdon.

form to reasonable rules intended to lessen the chances of their being injured? We know of no well-considered case which holds that they may not do so, nor has any sufficient reason been shown why they should not. In doing so, they at least seek to guard the lives of their passengers.

The baggage-car is a known place of danger. In this respect it differs from the cow-catcher and the platform only in degree. It is placed ahead of the passenger-cars and next to or near the locomotive. In cases of collision, it is the first car to give way to the shock, and frequently is the only one seriously injured. It is treated as dangerous by the rules of all well-regulated companies, and the rule of the defendant company emphatically declared it to be so. An infant or an idiot might be excused for riding in such a position, by reason of his lack of mental capacity, but an intelligent man, accustomed to railroad travel, must be presumed to know its danger. It is patent and the same under all circumstances.

Can a passenger who voluntarily leaves his proper place in the passenger-car, in violation of the rules of the company, to ride in the baggage-car, or other known place of danger, and who is injured in consequence of such violation, recover damages for such injury? We are not speaking of a possible accident, the result of a brief visit to the baggage-car to give some needed direction about a passenger's luggage, to have it re-checked, or for any other legitimate purpose, but of a person who rides in a baggage-car in violation of a known rule of the company, and who is injured in consequence of such violation.

In considering this question, regard must be had to the character of the rule violated. The rules adopted by railroad companies are a part of their police arrangements. Some of them are for the convenience of the company in the management of its business. Others are for the comfort of passengers, and yet others have regard exclusively to the safety of passengers. The distinction between them, and the difference in the consequences of their violation, is manifest. As an illustration: it would be unreasonable to hold that the violation of the rule against smoking could be set up as a defense to an action for personal injuries resulting from the negligence of the company. On the other hand, should a passenger insist upon riding upon the cow-catcher, in the face of a rule prohibiting it, and as a consequence should be injured, I apprehend it would be a good defense to an action against the company, even though the negli-

Pennsylvania Railroad Company v. Langdon.

gence of the latter's servants was the cause of the collision or other accident, by which the injury was occasioned. And if the passenger thus recklessly exposing his life to possible accidents were a sane man, more especially if he were a railroad man, it is difficult to see how the knowledge or even the assent of the conductor to his occupying such a position could affect the case. There can be no license to commit suicide. It is true the conductor has the control of the train and may assign passengers their seats. But he may not assign a passenger to a seat on the cow-catcher, a position on the platform, or in the baggage-car. This is known to every intelligent man and appears upon the face of the rule itself. He is expressly required to enforce it, and to prohibit any of the acts referred to, unless it be riding upon the cow-catcher, which is so manifestly dangerous and improper, that it has not been deemed necessary to prohibit it. We are unable to see how a conductor, in violation of a known rule of the company, can license a man to occupy a place of danger so as to make the company responsible. It is otherwise as to rules which are intended merely for the convenience of the company or its passengers. It was said by WOODWARD, J., in *Sullivan v. The Railroad Co.*, *supra*, that "on the part of the passenger, his assent is implied to all the company's reasonable rules and regulations for entering, occupying and leaving their cars; and if injury befall him by reason of his disregard of regulations, which are necessary to the conduct of the business of the company, the company are not liable in damages, even though the negligence of their servants concurred with his own negligence in causing the mischief." This principle is even broader than the one we are now contending for. We only assert here, that if a passenger willfully violates a known rule intended for his safety, and is injured in consequence of such violation, he is not entitled to recover damages for such injury.

We are not aware that the foregoing views conflict with any of our own cases. They may not harmonize with some of the dicta which lie scattered through them, but a careful examination of the points decided shows no serious embarrassment. In *O'Donnell v. The Allegheny Railroad Company*, 9 P. F. Smith, 239, one of the cases relied upon to sustain the contrary view, the court below instructed the jury, as we gather from the opinion of AGNEW, J.: "Summing up the doctrine of the court as found in the charged answers to the points, it was this: That the baggage-car is an im-

Pennsylvania Railroad Company v. Langdon.

proper place for a passenger, and whether the rule of the company forbidding him to be there is made known to him or not, his own intelligence should teach him that it is not his proper place ; that if he leave his seat in the passenger-car to go into the baggage-car, he is guilty of negligence ; that nothing less than a direction or an invitation from the conductor to go there will excuse his negligence, and such direction or invitation should not be inferred from the mere fact that he had been accustomed to ride frequently in the baggage-car, with the knowledge of the conductor and without objection. The judge therefore instructed the jury that if the plaintiff left the passenger-car without the direction or invitation of the conductor, he did what no passenger has a right to do, even though he had been accustomed to ride there with the knowledge of the conductor and without objection." It will be noticed that this court did not deny the correctness of this ruling as an abstract proposition. It was merely held that it was not correct as applied to the facts of that case. It was said by the court : " In view of the evidence this instruction was erroneous." What was the evidence ? Again I quote from the opinion : " The plaintiff had been riding in the baggage-car for about two months. Murphy, the conductor, himself admitted, that Liston's men rode frequently in the baggage-car without his objecting ; that he never ordered them out. When they got on that car, they generally remained there without objection ; that he had no recollection of requesting them to go into the passenger-car, and that he had not at any time requested the plaintiff to leave the baggage-car. The reason for this is obvious. These hands, though passengers on the train from the terms of their employment, still retained the outward appearance of employees. They were in their working clothes, which, owing to their employment, were doubtless often soiled and filled with perspiration. They were probably at times not considered traveling companions for those who sat in the passenger-cars, and at times the cars were probably filled. It was not at all unnatural that they themselves should wish, and that the conductor should desire them to travel on the baggage-car out of the immediate presence of the passengers. Under these circumstances it cannot be justly said of them, as of ordinary passengers, ' that any one who is possessed of sufficient intelligence to travel should be held to know that the baggage-car is not an appropriate place for passengers,' nor to say, although the consent of the conductor to riding

Pennsylvania Railroad Company v. Langdon.

there may be inferred from these facts, yet it does not follow that the company is liable, unless it is shown that they were there at the invitation or by the direction of the conductor," and in concluding his opinion the learned judge said: "From the evidence in this case the jury might reasonably conclude that O'Donnell was in the baggage-car with the permission of the conductor, and for the benefit of the company, and was rightfully there at the time of the accident." It will be observed that the case was put mainly upon the ground that the plaintiff and his co-employees had been riding in the baggage-car daily for two months under circumstances which would justify the jury in finding that it was an arrangement for the benefit of the company. It may be conceded that if a baggage-car is used as a passenger-car for months, the full measure of responsibility would attach. There is nothing of the kind here. The deceased was riding in the baggage-car for his own convenience, and to have a chat with the baggage-master, with whom he appears to have been intimate. The assent or even the knowledge of the conductor was not shown. The jury were allowed to guess at it by reason of the submission of this question of fact upon clearly insufficient evidence. In *Lackawanna and Bloomsburg Railroad Co. v. Chenewith*, 2 P. F. Smith, 382, there was a violation of the rules of the company, but it was a rule that had no relation to the plaintiff's safety as a passenger. He induced some of the company's employees, in the absence of the superintendent, to attach his freight-car to a passenger train, agreeing to run all risks, and to attend to the brakes on his own car. The engine ran over a cow, by means of which the plaintiff was injured. It is manifest the facts of this case have no analogy to that of a passenger who leaves his seat in the cars, and rides in a known place of danger, in violation of the company's rules. The court evidently had this view, for it was said by Mr. Justice THOMPSON, in delivering the opinion: "If a passenger puts himself out of place, and in a place of danger, and is injured as the result, this is *damnum absque injuria*, and he cannot recover." The recent case of *Creed v. Penn. R. R. Co.* 86 Penn. St., 139; 27 Am. Rep. 693, also rests upon an entirely different state of facts. There the deceased was riding in the caboose-car at the rear end of the train, in violation of the rules of the company. But it nowhere appeared that the rule violated was intended for the safety of passengers, nor was it even alleged that the caboose-car was a place of danger. On the contrary, it was said, by Mr.

Pennsylvania Railroad Company v. Langdon.

Justice GORDON: "No presumption of negligence can arise, either in fact or in law, from the fact of Creed's occupancy of the caboose, for there is no evidence that it was in any degree more unsafe than any other car on the train. It was, indeed, under all ordinary circumstances, the one that was the most safe; from collisions in front of train it was protected by the cars which preceded it, and from dangers behind, being itself a lookout, it was guarded by the constant vigilance of the employees." The distinction between this case and the one in hand is so palpable that further reference to it is unnecessary.

Our own cases give us no trouble. Nor is there serious difficulty in the authorities outside of this State that have been called to our attention. In *Dunn v. Grand Trunk Railway Company*, 58 Me. 187; s. c., 4 Am. Rep. 267, the plaintiff got on board a freight train in violation of the rules of the company. The conductor did not put him off, nor request him to leave, but accepted his fare as a first-class passenger. It was held, that he was entitled to recover for injuries caused by the negligence of the company's servants. Here, the conductor accepted his fare as a first-class passenger, and permitted him to take his seat in the saloon-car of the freight train. There was no point that it was a place of danger, nor that the rule was intended for the safety of passengers. On the contrary, it was manifestly a mere police regulation in the interests of the company. It was said by APPLETON, C. J., in delivering the opinion of the court: "If any extraordinary danger arises from the violation of the known rules of the company, as by standing on the cars when in motion, the passenger violating the rules assumes the special risks resulting from such violation. But if the act of the passenger in no way conduces to the injury received, the carrier must be held responsible for the necessary consequences of his negligence or want of care." *Isbell v. New York & New Haven Railroad Company*, 27 Conn. 393, was an action brought to recover damages for cattle killed upon the track, and has no application. *Keith v. Pinkham*, 13 Me. 501, was a case of injury to a passenger by stage. He took a seat on the outside of the coach, there being a vacant seat inside, after being told that if he did so it would be at his own risk. The defendant asked an instruction that if plaintiff had been directed to take an inside seat he could not recover. APPLETON, J., said: "If the plaintiff was injured through his or their neglect, he being in the exercise of

Pennsylvania Railroad Company v. Langdon.

ordinary and common care in the way of contributing to the injury by his position, he might well maintain this suit. The fact that the plaintiff took his position outside was a circumstance proper for the consideration of the jury in determining whether his negligence contributed in any way to the production of the injury. But the requested instructions took from the jury all inquiries as to the attendant negligence, and they were rightfully withheld." Here, the plaintiff took a seat intended for passengers and usually so occupied. If it was a place of danger, such fact did not appear, and it may be safely said as a general rule, the result of every intelligent man's experience, that an outside seat on a stage-coach cannot be pronounced extra hazardous as a matter of law. It was properly left to the jury. *Huelenkamp v. Citizen's Railway Company*, 37 Mo. 537, was an injury to a passenger whilst standing on the platform of a city car. No notice was given not to ride there, nor was any rule of the company shown. The question whether it was a position of danger was not raised, and there is little analogy in this respect between a horse-car in a city, and a car propelled by steam. *Richmond v. Sacramento Valley Railroad Company*, 18 Cal. 351, was a case of a passenger who was injured by an accident caused by cattle upon the track. It is not in point. In *Washburn v. Nashville & Chattanooga Railroad Company*, 3 Head, 638, the plaintiff was injured whilst riding in the baggage-car. In this respect it resembles the case under consideration. But here the analogy ceases. The plaintiff was travelling upon a pass, and the principal question was whether he could recover for that reason. This question was settled by *Railroad Company v. Derby*, 14 How. 468. No point was made in regard to a rule of the company prohibiting the use of the baggage-car for passengers, nor was the fact of its being a place of danger referred to. *Carroll v. New York & New Haven Railroad Company*, 1 Duer. 571, was a case decided in the Superior Court of the city of New York, and much relied upon as sustaining the opposite view. There, as here, the plaintiff was injured whilst in the baggage-car, and would have escaped if he had been in the passenger-car. The court recognized the fact that the baggage-car was a place of danger, but held, that inasmuch as he was there with the knowledge and consent of the conductor, he was there rightfully, and was entitled to recover. But there was no question made of the violation of such a rule as we have here, nor was even the existence of a similar rule shown. In its absence, it

Pennsylvania Railroad Company v. Langdon.

may well be that the assent of the conductor gave him the right to be in the baggage-car, and if he was there lawfully, under all the authorities he was entitled to recover. *Jacobus v. St. Paul & Chicago Railway Company*, 20 Minn. 125; s. c., 18 Am. Rep. 360, was also a case of injury to a passenger who was riding in the baggage-car, contrary to the rule of the company. The court said there was a conflict of evidence as to whether the plaintiff had been notified of the rule, but that inasmuch as he was shown to have been there with the knowledge and assent of the conductor, it made no difference. The learned judge who delivered the opinion relied upon *Railroad Co. v. Chenewith* and the line of cases I have just discussed. Whatever there is of confusion upon this question arises from the misapplication of the rule in *Railroad Co. v. Chenewith* and its cognate cases. The difference between a rule for the convenience of the company, and one for the safety of the passenger has been entirely lost sight of. In the former, the company would be liable unless the violation was the cause of the accident producing the injury; in the latter, it is sufficient to relieve the company that the injury was received in consequence of the violation of the rule, and this, notwithstanding the fact that the negligence of the company's servants was the cause of the accident. We do not regard *Jacobus v. The Railroad Co.* as entitled to weight as authority. The reasoning of the court is not satisfactory, and the authorities cited do not sustain the position assumed by the learned judge who delivered the opinion.

I am not aware that it has been decided in any well considered case that a passenger may, as a matter of right, ride in the baggage-car at the risk of the company. In a few cases it has been held that the assent of the conductor is sufficient to charge the latter with the consequences of such act, that it amounts to a waiver of the rule forbidding passengers to ride in the baggage-car. But how can a conductor waive a rule which, by its very terms, he is commanded to enforce? He may neglect to enforce it, and when the rule is a mere police arrangement of the company, such neglect may perhaps amount to a waiver as between the passenger and the company. But when the rule is for the protection of human life the case is very different. We are not disposed to encourage conductors or other railroad officials in violating reasonable rules which are essential to the protection of the travelling public. If it is once understood that a man who rides in a baggage-car in violation

Pennsylvania Railroad Company v. Langdon.

of the rules does so at his own risk, we shall have fewer accidents of this description.

On the other side we have the case of *Robertson v. Erie Railroad Co.*, 22 Barb. 91, in which case it was held, that where one rode upon the engine in violation of the known rules of the company, and was there injured, he could not recover, notwithstanding he was there with the assent of the engineer; and our own case of *Pittsburgh and Connellsville Railroad Co. v. McClurg*, 6 P. F. Smith, 294, in which it was held, that where a traveller "puts his elbow or his arm out of a car window, voluntarily, without any qualifying circumstances impelling him to do it, it is negligence *in se*; and where that is the state of the evidence it is the duty of the court to declare the act negligence in law."

The plaintiffs must be held to a knowledge by Langdon, the deceased, of the rule in question. Aside from the fact that it was conspicuously posted in the baggage-car, it is not disputed that the deceased was an employee of the defendant company; that he was temporarily out of work, as was alleged, by reason of the burning of the depot is not material. Whilst all his rights as a passenger are conceded, his position was such that he must have been familiar with a rule that is generally known to every intelligent man who travels by rail.

We need not pursue the subject further. We regard the weight of authority as with the principle indicated, and it is sustained by the sounder reason. Under the facts of this case the defendant's 1st, 2d, 6th and 7th points should have been affirmed without qualification.

[Omitting a statutory consideration.]

For the reasons given we are of opinion that the defendant's eighth point should also have been affirmed.

Judgment reversed.

STADTFIELD V. HUNTSMAN.

(92 Penn. St. 58.)

Sale — conditional — title of bona fide purchaser from vendee.

Furniture was sold upon the written agreement of the purchaser to pay not less than five dollars a week until the price was paid, the goods to be and remain the property of the seller, subject to removal upon failure to make any or all of such payments. The furniture was delivered to the purchaser, and he failed to make any payment, and sold it to a third person who had no knowledge of the agreement. *Held*, that the latter got valid title. (*See note, p. 664.*)

REPLEVIN. The opinion states the case. The plaintiff had judgment below.

Duff & Alcorn, for plaintiff in error.

Kennedy & Doty, for defendant in error.

PAXSON, J. It has long been an established rule in Pennsylvania, that a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase-money is paid, is fraudulent and void as to the creditors of the vendee, and innocent purchasers. Yet there are exceptions to the rule, that possession must accompany the ownership of chattels. It was said by TILGHMAN, C. J., in *Martin v. Mathiot*, 14 S. & R. 214; 16 Am. Dec. 491, that "There are certain necessary and lawful contracts by which the owner parts with the possession, and yet fraud cannot be presumed. Such are the contracts of lending and hiring, both very useful, and without which society could not well exist. It is of the essence of these that the owner should give up the possession for a time." Various devices have been resorted to at times to evade the above rule, but it is believed in the long line of cases upon this subject it has not been substantially departed from. There have been numerous cases of bailment, some of them perhaps very close upon the border, where no present contract of sale is made, that have been excepted from the operation of the rule. Any apparent conflict between decided cases is doubtless owing to the difficulty of applying the principle referred to to the facts of a particular case.

The transaction between the plaintiffs below and O. B. Carpenter was not a bailment either in form or substance. It was not a lending of the goods, nor was it a contract of hiring. It was a sale of the furniture for a stipulated sum or price, and was so charged upon plaintiffs' books. The delivery however was made upon an agreement signed by Carpenter to pay, "not less than five dollars for each succeeding week, until the above amount (\$113.75, the price of the articles) is paid; the goods above enumerated to be and remain the property of D. W. Huntsman & Co., subject to removal by them or their order, upon any failure to make any or all of the above payments." The purchaser having received the furniture under this agreement, placed it in his house, and failed to make any of the stipulated payments; and finally sold it to the defendant below, who took it without notice of the agreement. The court below held under the authority of *Enlow v. Klein*, 29 P. F. Smith, 488, that the defendant took no title, and the plaintiffs were entitled to recover.

A number of authorities were cited as sustaining the ruling of the court. A brief reference to them may not be out of place. *Clark v. Jack*, 7 Watts, 375, was a loan of personal property, subject to be turned into a sale at a future time upon compliance with certain conditions. It was said by the court: "Properly speaking, there was not a sale, but a contract to sell at a future day, and the delivery in the meantime was a loan subject to be turned into a sale by compliance with certain conditions." *Myers v. Harvey*, 2 P. & W. 478, was a clear case of bailment. The personal property in question had been purchased at a sheriff's sale and left in the possession of the defendant, under a lease from the purchaser. In *Lehigh Company v. Field*, 8 W. & S. 232, there was merely an agreement for a future sale. There was no present sale between the parties; the boatmen were the servants of the company; the boats in question remained in the ostensible ownership of the company; they retained their places on the company's register and were not distinguishable from their other boats; the men had merely the privilege of buying them at a future time when a bill of sale was to be made therefor. *Rose v. Story*, 1 Barr, 190, is an authority so strongly the other way, that we need not discuss it. No fault is found with the principle cited therefrom, that "where, by the terms of the contract, the vendee receives a chattel to keep for a certain time, and then to become the owner of it, if he has paid the stipu-

Stadtfield v. Huntsman.

lated price, otherwise to pay for its use, he receives it as bailee, and the property is not changed until the price is paid." This principle does not apply here, for we have no such facts. *Rowe v. Sharp*, 1 P. F. Smith, 26, was a bailment. Sharp by writing let to Goff two billiard tables for nine months, Goff to use them at his place of business; pay a certain sum for their use, and at the end of the term to re-deliver them; and if then Goff had complied with the covenants of the agreement, Sharp was to make him a bill of sale of the tables, the consideration for which was to be the sum paid for their use. This was held to be a bailment for the use of the tables, with provision for sale in case of payment of the price. In *Chamberlain v. Smith*, 8 Wright, 431, there was a contract by which a yoke of oxen was delivered to a hirer, "to keep and work in a reasonable farmer-like manner for the term of one year; said cattle to be returned in one year. But the said McWharter (the hirer) has the privilege, by paying \$40 and legal interest at the expiration of the year, to keep said cattle." Mr. Justice STRONG who delivered the opinion of the court, in speaking of this contract said: "It was a bailment, not a sale; a bailee received them to keep and use. He engaged to keep and use them in a reasonable farmer-like manner, and to return them at the end of the year. All this looks to a contract of hire and nothing else. Then follows the provision, that if the bailee would pay a definite sum at the end of the period for which the cattle were let, they should be his, but without any obligation on his part to buy them. No doubt a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor, until the purchase-money is paid, enables creditors of the vendee to seize and sell it for the payment of his debts." *Henry v. Patterson*, 7 P. F. Smith, 346, was a case of bailment, as was also *Becker v. Smith*, 9 id. 469. *Enlow v. Klein*, 29 id. 488, relied upon by the court below, and the last of this series of cases, is an admittedly close case, and comes nearer sustaining the contention of the plaintiffs than any of those commented upon. Yet we regard it as rightly decided and easily distinguishable from the one in hand. An examination of the facts shows, that it was a case of hiring; that two dollars per week of the sum to be paid, was for the use or hire of the horses. This clearly appears in the report of the facts, and is also referred to in the opinion of our lamented brother WOODWARD. This was an important feature of the case in our consultation, and is referred to now that it may not be misunderstood hereafter.

Stadtfield v. Huntsman.

Enlow v. Klein was justified by the authorities, and we do not propose to disturb it. But we will not take one step beyond it. We stop just where it ends.

The force of the argument for the plaintiff was spent in showing that a case of bailment is not within the rule laid down for conditional sales. The principle is conceded, but it has failed in showing the existence of a bailment. On the contrary it was a sale, and comes directly within the ruling of *Clow v. Woods*, 5 S. & R. 275; 9 Am. Dec. 346; *Babb v. Clemson*, 10 id. 419; 13 Am. Dec. 684; *Martin v. Mathiot*, 14 id. 214; 16 Am. Dec. 491; *Jenkins v. Eichelberger*, 4 Watts, 121; *Rose v. Story*, 1 Barr, 190; *Mitchell v. Commonwealth*, 1 Wright, 187; *Waldron v. Haupt*, 2 P. F. Smith, 408; *Haak v. Lindermann*, 14 id. 499; s. c., 3 Am. Rep. 612, and similar cases.

The judgment is reversed and judgment *non obstante veredicto* for the defendant upon the reserved point.

NOTE BY THE REPORTER. This case was cited and followed by the same court in *Brunswick v. Hoover*, Nov. 1880. There B. sold to R. billiard tables on credit. On the delivery, an agreement in writing was made between B. and R., wherein it was set forth that the tables were leased to R. for one year for a sum which was equal to their purchase-price, B. agreeing upon the payment of that sum to give R. a bill of sale of the tables. Held that the tables were liable to seizure upon execution against the property of R.

The court said: "Such a contract, while good between the parties, will not keep creditors at bay. It is worthless as to them. There is no principle of law better settled in Pennsylvania than that a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase-money is paid, enables creditors of the vendee to seize and sell the same for the payment of his debts. It would be a needless labor to cite the numerous cases in which this doctrine has been asserted. It was urged however that the case in hand is upon all fours with *Rowe v. Sharp*, 1 P. F. Smith, 27, and that we cannot affirm this judgment without overruling that case. *Rowe v. Sharp*, like *Enlow v. Klein*, was a close case, and stands upon the border. It differs from the present one in two important particulars. While in *Rowe v. Sharp* there was evidence of a sale of the billiard tables by Sharp to Goff a few days prior to the lease, there was no agreement for a lease or security; and again in *Rowe v. Sharp* there was an express stipulation for a return of the property at the end of the bailment. This important part of a contract of bailment is wholly omitted in the lease between the parties to this contention. The lessors may re-enter and take possession of the property upon a breach by the lessee of the covenants contained in the lease. But if the lessee fulfills his covenants, that is to say, if he pays the several installments as they mature, the lessor cannot reclaim the property, nor is the lessee bound to restore it after the bailment is over. There is not a single element of a bailment in this transaction. It is immaterial what the parties call it, the law pays little heed to the label; it looks beneath and examines the nature and character of the contract between the parties."

The doctrine of these decisions stands almost alone. The contrary doctrine is adopted by Mr. Benjamin, (Sales, § 320, and note n, 8d Am. ed.) Mr. Bennett there cites a long list of authorities to support the text, comprising the States of Massachusetts, New York, Missouri, Arkansas, California, Connecticut, Georgia, Indiana, Iowa, Ohio, New Hampshire, Michigan, Illinois, Maine, Vermont and the Federal Courts and those of Canada.

As the doctrine in New York has been held both ways, and as the earlier decision has

Stadtfield v. Huntsman.

been relied on in several States, it may be well to review the main New York cases, *Wait v. Green*, 36 N. Y. 556, and *Ballard v. Burgett*, 40 id. 814, and for this purpose we extract the following from 24 Albany Law Journal, 264:

"Has *Wait v. Green* been overruled in this State? We think so, decidedly, although the judges, with their usual politeness, have struggled to distinguish it. As we have seen, the facts in that case were that a horse was sold and delivered, and a note taken for the price, with a stipulation underwritten, signed by the purchaser, stating that the seller 'holds the horse as her property until the note is paid.' The facts in *Ballard v. Burgett* were that oxen were sold and delivered, 'with the agreement that they were to remain the property of the plaintiff until paid for.' GROVER, J., speaking of *Wait v. Green*, remarked: 'The fair intendment from the above facts is, I think, that Mrs. Comins intended to sell and deliver the horse to Billington, and transfer the title to him, and take back from him security for the payment of the note in the nature of a chattel mortgage upon the horse. It is clear that had the horse died without the fault of Billington, before the payment of the note, this would have been no defense to an action on the note. The horse was at the risk of Billington.' 'Not so in the case at bar. Had the oxen died without the fault of France, no action could have been sustained by the plaintiffs for the purchase-money.'

"Now mark the two phraseologies: 'Holds the horse as her property until the note is paid;' 'the oxen to remain the property of the plaintiff until paid.' There is no difference in these expressions and human ingenuity cannot point out any. If one 'holds' property as his own in the hands of another, it 'remains' his; and if property in the hands of another 'remains' his, he 'holds' it. Indeed, Judge BOCKES, in pronouncing the opinion in *Wait v. Green*, said: 'Let it be conceded that * * * the agreement was that the horse should remain the property of Mrs. Comins (the seller) until paid for,' etc. So he makes it exactly the case of *Ballard v. Burgett*. If a man intends to make a chattel mortgage on property which he sells and delivers, he does not say he 'holds' the property. He does not 'hold' it; the vendee 'holds' it. Such language indicates a bailment — that the property is still the property of the seller, and is to be his until the fulfillment of the condition upon which it is delivered. Judge GROVER's assumption that Billington would have been liable on the note if the horse had died before its maturity, is a mere begging of the question. In his concurring opinion in *Ballard v. Burgett*, LOTT, J., said that he thought Judge BOCKES' language 'too strong,' and that the decisions cited by him 'do not sustain the doctrine laid down;' but he thought the statement of facts in *Wait v. Green* 'warrants the inference that the concurrence of the other judges was upon the ground that there had been an absolute and unconditional delivery of the horse. It states that Mrs. Comins sold and delivered it to Billington, and took his note,' with the stipulation that she 'holds the horse as her property until the above note is paid.' For aught that appears however the delivery of the horse and that of the note were simultaneous. In the report of the case below, 35 Barb. 585, it appears that they were simultaneous. See 40 N. Y. 826. And this is what Judge LOTT calls an 'unconditional delivery!' JAMES and MURRAY, JJ., could not distinguish the case from *Wait v. Green*.

"*Comer v. Cunningham*, 77 N. Y. 391; s. c., 83 Am. Rep. 626, is not in point. That was a case of unconditional delivery, so what Judge RAPALLO says about *Wait v. Green* and *Ballard v. Burdett* is *obiter*. He says: 'If the transaction is to be regarded as a conditional sale, the case is in conflict with the two last cited cases in 40 and 46 N. Y., but it can be well treated as a case only of conditional delivery.' He then distinguishes the case on the ground assigned by GROVER, J."

"It seems to us a solecism to speak of an *unconditional sale* accompanied by a *conditional delivery*. Delivery is a fact effectuating a sale. Conditions attached to the agreement of transfer — the sale; not to the delivery. Delivery accompanied by a condition that title shall not pass until a future day or the fulfillment of a condition, is not a sale; it is a *bailment*, which will ripen into a sale only on the fulfillment of the condition.

"In *Austin v. Dye*, 46 N. Y. 500, ALLEN, J., said: 'There was an attempt to distinguish *Ballard v. Burgett* from *Wait v. Green*, but with what success it is not necessary to consider, and whether there is any distinction in principle is not very apparent, and is not necessary to be determined here.'

"*Smith v. Lynes*, 5 N. Y. 41, goods were sold on condition of being paid for on delivery,

Stadtfield v. Huntsman.

by indorsed notes. The goods were delivered without exacting the notes, and the court held that the condition was waived and title had passed. The court said: 'Where there is a condition precedent attached to a contract of sale and delivery, the property does not vest in the vendee on delivery, until he performs the condition or the seller waives it. An absolute and unconditional delivery is regarded as a waiver of the condition. By an absolute delivery without exacting the performance of the condition, the vendor is presumed to have abandoned the security he had provided for the payment of the purchase-money, and to have elected to trust to the personal security of the vendee.' *Raele v. Dasher*, 3 Keyes, 572, is to the same effect. RAPALLO, J., says of these two cases, in *Comer v. Cunningham*, they 'establish that a condition that the title shall not pass until payment, when attached to a *delivery upon an actual completed contract of sale*, is available only as against the vendee and persons claiming under him, other than *bona fide* purchasers without notice.' To this we say, that a conditional contract of sale cannot be regarded as completed until the condition is complied with or waived. Delivery without compliance may waive it or may not, according to circumstances. In *Smith v. Lynes* it clearly did waive it, because the fulfillment of the condition was to be contemporaneous with the delivery—giving indorsed notes on delivery. In *Watt v. Green* it *did not clearly waive it*, because the condition was not to be fulfilled until a future day—the maturity of the note. We think the condition in *Watt v. Green* was *clearly not waived*, because it was insisted on in spite of the delivery—the seller 'holds the horse as her property until the note is paid.' Every thing then depends upon the circumstances. If the delivery is 'unconditional,' why then—the delivery is unconditional. * * * The real question in every case is, did the parties intend to have the title pass on the delivery?"

BOCKES, J., who delivered the opinion in *Watt v. Green*, considered it overruled, and observed: "The heresy of that case should not be perpetuated." See 46 How. Pr. 530, note.

The case of *Vaughn v. Hopson*, 10 Bush, 340, founded on *Watt v. Green*, supports the Pennsylvania doctrine. There Hopson sold a mule to Hull, taking his note for the price, Hull annexing to the note a stipulation that the note was given for a mule, "and the mule is bound or the title of the mule remains in Hopson until he gets his money." This was almost exactly like the case of *Watt v. Green*. True, "the mule is bound" sounds like a mortgage, but "the title remains" is equivalent to "holds the property." In *Vaughn v. Hopson*, the court said: "The appellee in this case made a conditional sale of the mule to Hull with an unconditional delivery of the possession." They continue. "Hilliard on Sales of Personal Property (page 114) says: 'With regard to a *bona fide* purchaser of the goods from the original vendee the prevailing doctrine has been that the goods could not be reclaimed from him by the original seller.' Chancellor KENT, in discussing this question, concludes 'that the vendor's right to the goods will be good as against the buyer from him and his voluntary assignee, though not as against a *bona fide* purchaser from the vendee.' 2 Kent Com. 497. In the case of *Smith v. Lynes*, 1 Seld. 41, it is said: 'Every absolute delivery of goods sold on condition is presumptive evidence of a waiver of the condition by the vendor, and of an intention on his part to rely wholly on the personal security of the vendee for the payment of the price of the goods; that after actual delivery (although as between the parties to the sale such delivery may be conditional) a *bona fide* purchaser from the vendee gets a perfect title.' In the case of *Fleeman v. McKean*, 25 Barb. 474, the learned judge in treating of this question says: 'My impression at the time was, and still is, that as the original owner voluntarily placed the goods in the hands of the purchaser, and thus made him the ostensible proprietor, a sale by the purchaser to a *bona fide* dealer without notice would be valid and pass the title.' *Haggerty v. Palmer*, 6 Johns. Ch. 437. In the case of *Caldwell v. Bartlett*, 3 Duer, 352, it is said: 'It seems that in case of a sale and delivery, even when the delivery is conditional, a *bona fide* purchaser from the person to whom the delivery was made will acquire a valid title.' Again, 'if the sale was conditional, but the goods were delivered unconditionally, the title vested in Reed on the delivery, so that he could clearly confer title on a purchaser in good faith.' In the case of *Watt v. Green*, 36 N. Y. 558, Comins sold and delivered a horse to Billington for one hundred dollars, and took his note, payable in five months, with the stipulation annexed, 'that Mrs. Comins holds the horse as her property until the above note is paid.' The assignee of Comins instituted an action against the vendee of Billington for the recovery of the

Stadtfield v. Huntsman.

horse. The court held 'that the defendant was a *bona fide* purchaser from Billington, and the authorities are full that the defendant will be protected in his title.' Numerous authorities might be cited sustaining what we conceive to be the true doctrine on this subject, holding that where there is a conditional sale of chattels, with an actual delivery of possession to the vendee, a purchaser from the latter in good faith and without notice of the condition acquires a perfect title; nor does this rule when adopted apply, as is maintained it must by those holding a different view of the question, to a *mere offer to sell*. One may agree to sell to another, if he likes, his horse or his chattel after trial, and may deliver the possession for that purpose, and still no title will pass, even as against an innocent purchaser, as no contract of sale absolute or conditional has ever been made, or in cases where goods are to be paid for on delivery, and the purchaser without making payment and without the knowledge of the vendor takes the possession, in such a case the taking is tortious, and confers no title upon the vendee or the party purchasing from him."

In the recent case of *Ketchum v. Brennan*, 53 Miss. 596, personal property was delivered, to be paid for by installments, title not to vest until payment in full. The court said: "Reason and the overwhelming weight of authority pronounce in favor of the right of the vendor in such conditional sale to recover his property in the case stated, either from his vendee or a purchaser from his vendee. Who has not title, cannot confer it. In the case stated, the vendee has no title until he performs the condition on which title is to vest in him. Until payment of the price, by the express terms of the contract the title is in the vendor. No law forbids such a contract, which, being valid, determines the rights of the parties. A buyer must beware of purchasing from one who has not title. Possession is not title. It is *prima facie* evidence of title, but nothing more. A buyer should not content himself with *prima facie* title. It cannot avail him as against the title. It will, until the presumption arising from possession is removed; but when the *prima facie* title is destroyed by proof, that while title seemed to be in the possessor, it was in truth in another, the *prima facie* title must yield to the actual title. A buyer may trust to appearances; but if they prove false and delusive, he takes the risk, and must abide the result. Until possession shall be made conclusive evidence of title, a buyer must be held to take the risk that the *prima facie* title of his vendor, from possession, may be destroyed by the truth of the case. Whether the possessor of property has borrowed it, or hired it, or purchased it, and what is the nature and extent of his right to it, should be ascertained by him who proposes to deal with him as to such property." Citing *Patton v. McCane*, 15 B. Monr 555. "The Supreme Court of Kentucky has overruled the case of *Patton v. McCane*, *supra*, but we prefer the reasoning of the earlier case."

The same doctrine was held in *Talmadge v. Oliver*, 14 S. C. 522. There was in that case a written receipt for a horse, for which the receiptor was to board the owner and his wife for a specified period, "the horse to remain the property of" the owner "until the contract is satisfied." The title was held to remain in the owner as against a mortgagee of the receiptor.

In *Holman v. Lock's Adm'r*, 51 Ala. 287, the present New York doctrine as to the title of *bona fide* purchasers was declared in a short opinion without particular consideration. In *Sumner v. Woods*, 52 Id. 94, the contrary doctrine was pronounced in an equally brief manner, citing *Martin v. Mathiot*, 14 S. & R. 214. In *Dudley v. Abner*, 52 Ala. 572, the same doctrine was pronounced in a carefully-considered opinion, citing *Watt v. Green*, 36 N. Y. 556, and adopting the explanation of it by GROVER, J., in *Ballard v. Burgett*, 40 Id. 314, and also relying on *Martin v. Mathiot*, *supra*. But now these latter cases are overruled, and *Holman v. Lock's Adm'r* is re-established in the Alabama court, in *Fairbanks v. Eureka Company*, not yet reported.

In *Blackwell v. Walker*, United States Circuit Court, east district of Arkansas, July 1880, it was held by CALDWELL, D. J., as follows: "Conditional sales were valid at common law, and their validity was not affected by the English statute of frauds. Such sales, oral or in writing, are valid in Arkansas, and creditors of and purchasers from the conditional vendee acquire no right to the property as against the vendor, who has been guilty of no fraud and no laches in asserting his rights. In *Ayer v. Bartlett*, 6 Pick. 71, it is said: 'If the transaction is fraudulent, the vendor setting up a condition to the sale, yet suffering the vendee to be in possession, exercising full rights over the property, with the intent and purpose of enabling him to obtain credit on the strength of the property, he will not be

Stadtfield v. Huntsman.

able to avail himself of such condition, but the sale will be held to be absolute in regard to creditors. But if *bona fide*, and the object of the condition was merely security to the vendor, he shall not lose his property because some creditor of the vendee supposed it to belong to him." See also, *Armington v. Houston*, 38 Vt. 448; *Barrett v. Pritchard*, 2 Pick. 512; 13 Am. Dec. 499; *Marston v. Baldwin*, 17 Mass. 606; *Merrill v. Rinker*, 1 Bald. C. C. 526; *Blood v. Palmer*, 11 Me. 414; *Müller v. Bascom*, 28 Mo. 352; *Rogers Locomotive Works v. Lewis*, 4 Dill. 158. And it seems to be equally well settled that the vendor, who has been guilty of no laches in asserting his right to the property, may recover it from a *bona fide* purchaser from the vendee. *Coggill v. Hartford R. Co.*, 3 Gray, 545; *Ballard v. Burgett*, 4 N. Y. 314; *Bigelow v. Huntley*, 8 Vt. 151; *Sargent v. Metcalf*, 5 Gray, 306; *Hart v. Carpenter*, 24 Conn. 427; *Parmlee v. Catherwood*, 36 Mo. 479; *Benner v. Puffer*, 114 Mass. 378; *Thomas v. Winters*, 12 Ind. 823; *Dunbar v. Rawles*, 28 Id. 322; *Bailey v. Harris*, 1 Iowa, 833; *Hamans v. Newton*, 4 Fed. Rep. 880."

Ballard v. Burgett, *supra*, was cited and approved in *Singer Manufacturing Co. v. Graham*, 8 Oreg. 17; s. c., 34 Am. Rep. 572, the court observing: "This is too well settled now to admit of any doubt," and citing also *Enlow v. Klein*, 79 Penn. St. 488; *Hirschorn v. Canney*, 98 Mass. 149, and *Kohler v. Hayes*, 41 Cal. 455. This was the ordinary case of a lease of a sewing machine. The Massachusetts and California cases fully sustain the same doctrine. The California citation was the case of an ordinary piano sale on installments. The Pennsylvania citation was not the case of a *bona fide* purchaser, but that of a judgment creditor seeking to sell the property on execution. The property was held not to be subject to execution. In *Cole v. Berry*, 18 Vroom, 808; s. c., 36 Am. Rm. 511, and *Gardner v. Fairbrother*, 12 R. I. 233; s. c., 34 Am. Rep. 681, cases of a sewing-machine and a piano, respectively, it was held that the vendee got no interest subject to execution. The contrary doctrine however was held in *Lucas v. Campbell*, 88 Ill. 447; s. c., 31 Am. Rep. 81, the case of a piano lease, where an attachment was sustained. The contrary of the principal case is also held in the following additional cases, among others: *Clark v. Wells*, 45 Vt. 4; *Hotchkiss v. Hunt*, 49 Me. 219; *Raker v. Hull*, 15 Iowa, 277; *Hunter v. Warner*, 1 Wis. 141; *Shireman v. Jackson*, 14 Ind. 459; *Field v. Elmer*, 25 Mich. 48; *Price v. Jones*, 1 Head, 84; *Zuchtman v. Roberts*, 109 Mass. 53; s. c., 12 Am. Rep. 663. See also, *Herrford v. Davis*, 102 U. S. 235.

In *Rogers v. Whitehouse*, a recent case in the Supreme Court of Maine, it was held as follows: "Goods bought by a retail trader upon a condition that the property shall not vest in him until they are paid for, but with an understanding between him and his vendor that they are to go into his store and be sold by him in the regular course of trade, will not pass to his assignee in insolvency, or for the benefit of creditors, although the original vendor would be estopped to deny the title to those who might purchase portions of them of the retailer in the regular course of his business. It is not essential to the existence and validity of such a condition that the conditional vendor should have no right to sell to others. His assignee takes only such right as he himself could assert in the goods against his vendor, and if he has agreed that the property in the goods shall remain in the vendor until they are paid for, the vendor may replevy them from his assignee although such vendor could not dispute the title of those who had purchased portions of them in good faith and in the regular course of trade from his vendor. *Pickering v. Burt*, 15 East, 38; *Goss v. Coffin*, 66 Me. 482; s. c., 22 Am. Rep. 585; *Hersey v. Elliot*, 67 Me. 37; *Whitney v. Eaton*, 15 Gray, 226; *Burbank v. Crocker*, 7 Id. 158; *Stone v. Perry*, 60 Me. 4; *Hussey v. Thornton*, 4 Mass. 407; 3 Am. Dec. 224; *Hill v. Freeman*, 3 Oash. 250, *Tubbs v. Towle*, 12 Me. 341."

Burrill v. Dollar Savings Bank.

BURRILL V. DOLLAR SAVINGS BANK.

(98 Penn. St. 184.)

Bank — savings — reasonableness of regulation — negligence.

A savings bank adopted the following rule: "If any person shall present a deposit book at the office of this corporation, and allege himself or herself, untruly, to be the depositor named therein, and shall thereby obtain from the officers of this corporation the amount deposited, or any part thereof, and the actual depositor shall not have given previous notice at the office of his or her book having been lost or taken from him or her, this corporation will not be responsible for the loss so sustained by any depositor, neither will this institution be liable to make good the same. Provided, that such payment has been entered in the book of the depositor at the time when made." This rule was conspicuously printed on the page fronting the title-page of the pass-book, and on the back of the pass-book was printed another of its rules to the effect that by receiving the pass-book the depositor would be considered as agreeing to be bound by the rules of the bank. A certain depositor was illiterate and could not read nor write when he opened his account and received his book, and he made his mark in the signature-book of the bank; but he subsequently learned to read and write. His book was temporarily stolen from his trunk, and the bearer received moneys from the bank thereon without his knowledge. *Held*, that the payment was valid as against the depositor. (*See note, p. 670.*)

ACTION to recover a bank deposit. The head-note states the facts. The court below gave the following opinion:

"Sections 1 and 10 of article 11, of the rules and regulations of the defendant company, are reasonable and proper for the protection of the defendant company and not unreasonable or too strict upon depositors. It is not requiring too much of them to keep their deposit books safely, and it is expressly so stipulated in the contract with them. The depositor must be presumed to know what the printed rules and regulations of his book require. If he cannot read he should inquire what they are. Common sense tells him they are there for some purpose; and common prudence would dictate that he should inquire of some one what they are, and how they may affect him. Besides, section 10 was printed by itself, in larger type on the front page, making it very prominent to the eye. We are therefore of the opinion, that the credit \$195 should be

Montgomery's Appeal.

allowed. Judgment is ordered to be entered for the plaintiff for \$194.57 on the verdict, on payment of the verdict fee."

H. H. McCormick, for plaintiff in error.

Rodgers & Oliver, for defendant in error.

PER CURIAM. Savings banks like the defendant in error, are really charities for the benefit of the poor. With many thousands of depositors they can only save themselves from imposition and loss by rules strictly enforced. The rule under which the defendants claim protection is a very reasonable one, and necessary for their safety. The fact that the plaintiff was illiterate, and could not read the rules in the bank book delivered to him, made no difference. He ought to have requested it to be read to him. Common prudence required this precaution. It is altogether unlike the cases of *Camden and Amboy Railroad Co. v. Baldauf*, 4 Harr. 67, and *Verner v. Sweitzer*, 8 Casey, 208, relied on by the plaintiff in error.

Judgment affirmed.

NOTE BY THE REPORTER. — In *Israel v. Bowery Savings Bank*, New York Common Pleas, General Term, February, 1881, the rules of a savings bank, which were printed in depositors' pass-books, provided that "no person shall have the right to demand any part of his principal or interest without producing the original book, that the payments may be entered therein;" and further, that "all payments made to persons producing the deposit book shall be deemed good and valid payments to depositors respectively." Held, that these regulations did not absolve the bank officials from the exercise of ordinary care when making payment upon the faith of the depositors' books; and that upon a trial involving the validity of such payments brought by a depositor against the bank, it would be necessary for the plaintiff to give proof of facts tending to show a failure to exercise reasonable care and prudence in disbursing the money. If, for instance, the signature of the receiving person should present a marked and noticeable dissimilarity to that of the depositor upon the bank's books, the failure to discover it would be evidence of negligence to be passed upon by a jury. See *Schoenwald v. Metropolitan Savings Bank*, 87 N. Y. 42; *Appleby v. Erie County Savings Bank*, 63 Id. 12.

MONTGOMERY'S APPEAL.

(92 Penn. St. 202.)

Administrator — voluntary and excessive payment by — limitation.

An administrator made a voluntary payment out of his trust funds to a person entitled thereto as a distributee, and by mistake paid more than such person's share. More than six years from the time of such payment having elapsed, held, that the amount could not be recovered or set off.

Montgomery's Appeal.

A PPEAL from auditor's report on distribution of an estate. The opinion states the case. The amount in question was set off below.

H. J. Vankirk and John W. A. Donnan, for appellants.

A. W. & M. C. Acheson and Braden & Miller, for appellees.

PAXSON, J. It is not denied that the appellant had a valid claim for arrears of dower charged upon the real estate of A. J. Montgomery, the assignor. The auditor finds the amount of it to be \$2,528.83. He declined to award it to her however, for the reason that the appellant is indebted to the assignor in the sum of \$2,699.94, being the amount overpaid her on the distribution account of the administrators of the estate of William Montgomery, deceased. The court below sustained the auditor in this ruling, and it forms the single subject of the three assignments of error.

It appears that the administrators of William Montgomery, deceased, of whom A. J. Montgomery, the assignor, was one, made a number of payments to the appellee as widow of the decedent on account of her distributive share during the years 1870 and 1871. Credits for these payments were claimed and allowed in their second administration account, filed November 18, 1872. The payments were made voluntarily, without a refunding bond or an agreement to repay. It is now alleged she was overpaid the said sum of \$2,699.94, and the creditors of A. J. Montgomery, one of said administrators, claim to have it set off in the distribution of his assigned estate.

Without discussing the right of the creditors to make such a set-off, it must fail, for the reason that A. J. Montgomery could not himself recover the money back. The payment was voluntary, and it is barred by the Statute of Limitations. That the payment was voluntary is settled by *Edgar v. Shields*, 1 Grant, 361; *Carson v. McFarland*, 2 Rawle, 118; *Hinkle v. Eichelberger*, 2 Barr, 483; *Natcher v. Natcher*, 11 Wright, 496. That some of the payments at least were made after the expiration of a year from the granting of the letters of administration we do not regard as material, as a payment by the administrator even then without a refunding bond or an agreement to repay was voluntary. The auditor and the court below were of opinion however that the statute did not begin

Gordon v. Commonwealth.

to run until the time the over-payment was discovered, to wit: in 1876. But when an administrator pays out money, he is presumed to know the condition of the estate. The assets are in his hands, and he is familiar with their amount and value. He ought to know, and is chargeable with knowledge, of the amount of claims against the estate when he makes a payment on account of a distributive share. It would be a great hardship upon distributees, to whom an administrator has voluntarily made payments on account of their shares, if they may be called upon for repayment after the lapse of years. They may have spent it, or increased their style of living in entire good faith, and ignorance of any over-payment. We are of opinion that the statute commences to run against the administrator from the time of such payments.

The decree is reversed at the costs of the appellees, and it is ordered that distribution be made in accordance with this opinion

Judgment accordingly

GORDON V. COMMONWEALTH.

(22 Penn. St. 216.)

Evidence — grand juror — testifying to testimony before grand jury.

It is competent for a grand juror, on the trial of an indictment, to testify to what the prosecutor testified before the grand jury, for the purpose of showing a discrepancy between that and her testimony on the trial.

CONVICTION of fornication, etc. The opinion states the case.

Crummie & Murdock, for plaintiff in error.

Braden & Miller and *J. Add. McIlvaine*, district-attorney, for Commonwealth.

MERCUR, J. This was a prosecution for seduction, fornication and bastardy. The prosecutrix testified that the plaintiff in error had criminal connection with her on the 2d, 5th and 6th, respectively, of September, 1877. On cross-examination she answered that she was a witness before the grand jury at the January Sessions, 1878, on a charge of rape against him, and then testified that

the rape was committed on the 29th of September, 1877. She was further questioned whether, on that hearing she was not asked by the foreman of the grand jury, if prior to the 29th of September, the time of the alleged rape, Mr. Gordon ever had criminal connection with her, and whether in answer thereto she did not say "No. He had frequently insisted upon it, but I had always refused him. That was the first, last and only time." She swore she was not asked that question, and made no such answer. With a view of casting discredit on her testimony, and impairing her character as a witness, the plaintiff in error called the foreman of that grand jury, and proposed to prove by him that he did then ask her that question, and that she so answered. The question put to the grand juror was objected to, principally on the ground that it was against the policy of the law to permit a grand juror to disclose what was sworn to in the grand jury room. The court sustained the objection. This constitutes the sole ground of alleged error.

If the witness be incompetent for the purpose offered, it must be by reason of public policy. The question to its full extent does not appear to have been ruled by this court. As the rule was held at an early day he would be incompetent. For a long time however the courts have gradually been modifying its strictness, and manifesting a determination to distinguish between the character of the evidence offered. The juror may be a competent witness for some purposes and not for others. Thus in *Sykes v. Dunbar*, 2 Wheat. Selw. N. P. 1070, one of the grand jury, by whom a true bill had been found, was held competent to testify as to who was the prosecutor, although it was contended he could know the fact only from the testimony which had been produced before him in his character as a grand juror, and which it was claimed he was bound not to disclose. This case was cited with approbation in *Huidekoper v. Cotton*, 3 Watts, 56, and the competency of a grand juror to testify as to who was the prosecutor, affirmed. In this case that part of the grand juror's oath, "the Commonwealth's counsel, your fellows' and your own, you shall keep secret," was considered, and a reasonable construction given to it. Substantially it was said the oath and whole proceeding before a grand jury were intended to protect the innocent witness and juror, but to punish the guilty party. It should not be so construed as to punish the innocent or obstruct the due course of justice. On no sound principle can it be said that a witness who has testified before a grand jury shall be permitted to claim

that his evidence was a privileged communication, so that it shall not be shown, under the direction of the court, whenever it becomes material in the administration of justice. It is material when the evidence is necessary to protect public or private rights. It must be conceded that the rule shall not be carried so far as to conflict with the juror's oath. He shall not testify how he or any member of the jury voted, nor what opinion any of them expressed in relation thereto, nor to the act of either which might invalidate the finding of the jury. His action, and the action of his fellow-jurors, must be shown only by the returns which they make to the court. What a witness has testified to before them is quite another matter. A witness may be indicted for perjury, for false swearing before a grand jury, and grand jurors are competent witnesses to prove what he swore to before them. 1 Whart. Am. Crim. Law, § 508. It is said in 1 Whart. Law of Ev., § 601, "It was at one time supposed that a grand juror was required by his oath of secrecy to be silent as to what transpired in the grand jury room; but it is now held that such evidence, whenever it is material to explain what was the issue before the grand jury, or what was the testimony of particular witnesses, will be required." This conclusion appears to be sustained by numerous authorities, among which may be cited: *Thomas v. Commonwealth*, 2 Robinson (Va.), 795; *State v. Offutt*, 4 Blackf. 355; *State v. Fassett*, 16 Coun. 457; *Commonwealth v. Hill*, 11 Cush. 137; *State v. Broughton*, 7 Ired. 96; *Commonwealth v. Mead*, 12 Gray, 167; *Way v. Butterworth*, 106 Mass. 75. The case of *Commonwealth v. Mead*, *supra*, rules the precise case we have before us. It was an indictment for manslaughter. To contradict a witness who testified in behalf of the Commonwealth, on the trial, the defendant offered to prove by the grand jurors who found the indictment, that he testified differently before them. The court below excluded the witnesses on the ground that it was against public policy and established practice to permit grand jurors to detail the evidence given before them, for the purpose of impeaching the witness on the trial of the indictment. On exceptions taken the case was reversed. The court holding that when the case was reached for trial all useful purposes of secrecy had been accomplished. The necessity and expediency of retaining the seal of secrecy were at an end, and the jurors were held competent for the purpose of proving the facts.

The indictment for the rape in which the prosecutrix testified

Johnston v. Speer.

was found in January, 1878. In the present case the indictment was found in January, 1879. The district attorney elected to try the latter first. The offer in contention is not to prove what the witness testified to before the grand jury in the prosecution for rape with a view of contradicting it, or of casting discredit on its accuracy. Its purpose is to impair her testimony now by proving that she swore to a different state of facts on another occasion, in conflict with her present evidence. It is not in conflict with the oath of a grand juror, to prove by him her previous testimony. It is material evidence of which the plaintiff in error should not be deprived unless demanded by public policy. We think it is solely a question of public policy. The reasons given at an early day for excluding the kind of evidence offered, and for holding a grand juror incompetent to testify to such facts, have lost their force.

The knowledge by a witness, who is examined before a grand jury, that the jurors may testify to what he has there sworn, will tend to advance the cause of truth and justice. A wise public policy, and the rights of person and of property, require us to hold the foreman of the grand jury to be a competent witness for the purpose offered.

Judgment reversed and a *venire facias de novo* awarded.

Judgment reversed.

JOHNSTON V. SPEER.

(92 Penn. St. 287.)

Negotiable instrument — attorney fees — amount blank.

A promissory note providing for the payment of "—— per cent attorney's commissions if collected by legal process," is not negotiable. (*See note, p. 677.*)

ACTION on a promissory note providing for the payment of "—— per cent attorney's commissions if collected by legal process. The defendant had judgment below.

D. Kaine, for plaintiff in error.

W. Playford, for defendant in error.

GORDON, J. If there is any thing positively settled with reference to an agreement, in a bond, mortgage or note for the payment of a fixed sum as attorney's commissions, it is that the sum so fixed belongs to the payee or mortgagee as a compensation for the expenses and trouble he may incur in the collection of the claim. It does not belong to the attorney who collects such claim, and it is not part of the costs of the case. *Faulkner v. Wilson*, 3 W. N. C. 339.

In *Robinson v. Loomis*, 1 P. F. Smith, 78, it was held that such an agreement could not be regarded as a penalty, but as an agreed compensation for expenses incurred by the mortgagee in consequence of the default of the mortgagor. According to this doctrine, the stipulation for attorney's commissions would amount to an agreement for stipulated damages, over which the courts would have no control, as in such case the agreement of the parties would be the law of the case. *Westerman v. Means*, 12 Penn St. 97.

Following this rule, the agreement, in this case, for blank attorney's commissions, amounts to nothing, for the blank could be filled only by the subsequent agreement of the parties, and until so filled it would have no force whatever.

But in *Daly v. Maitland*, 7 Norris, 384, a somewhat different doctrine is held, for Mr. Justice SHARSWOOD, in delivering the opinion in that case, says: "This principle of liquidated damages is not applicable however to a contract for a loan of money; at least, such stipulation is subject to the control of courts of equity." The effect of this decision is to give the agreement for commissions the character of a penalty, or of a stipulation that damages shall not exceed a certain amount. If we adopt this rule, then a stipulation to pay attorneys' commissions would be equivalent to a contract to pay damages,—reasonable damages, or such damages as a court, at its discretion, might fix.

However this may be, there is one thing about which we feel little doubt: that is, that uncertain stipulations of this kind ought to have no place in negotiable paper. As was said in *Woods v. North*, 3 Norris, 407; s. c., 24 Am. Rep. 201: "It is a necessary quality of negotiable paper that it should be simple, certain, unconditional; not subject to any contingency." It is certain that the note in suit does not meet the conditions above prescribed, for in any event the question what the parties meant by the blank is an open one, and may have to be settled by oral testimony.

Juagment affirmed.

Appeal of Bredin.

NOTE BY THE REPORTER.—To same effect, *First National Bank of New Windsor v. Bynum*, ante, 604.

In *Dow v. Updike*, Nebraska Supreme Court, 11 Neb. 95, it was held that a stipulation in a promissory note to pay a reasonable attorney's fee for instituting a suit on the note, in addition to legal interest, is illegal and void. But this was put on statutory ground. The court said: "In the year 1873 'An act to provide for the allowance and recovery of attorney's fees in certain actions,' was passed by the legislature. This act provided 'that in all actions brought for the foreclosure of a mortgage, or upon a written instrument, for the payment of money only, there shall be allowed by [to] the plaintiff, upon a recovery of judgment by him, a sum, to be fixed by the court, in addition to the judgment, not exceeding ten per cent of the recovery, as an attorney's fee, in all cases wherein the mortgage, or other written instrument upon which the action is brought, shall, in express terms, provide for the allowance of an attorney's fee.' This act was repealed in 1879, the law taking effect June 1, of that year." "In this State, attorney's fees were not allowed prior to the passage of the act of 1873; and the legislature, by repealing that act, evidently intended to withdraw from the plaintiff the right to recover the same."

In *Miner v. Paris Exchange Bank*, 58 Tex. 559, it was held that if a contract is lawful in other respects a conditional stipulation to pay the usual attorney's fees, in the event suit has to be instituted to enforce it, would be legal and founded upon a valuable consideration. Such fees, though not an element of damages in an ordinary suit for the collection of money, can be made such by express contract. The authorities, *pro* and *con*, on this vexed question, can be found in a note, 29 Am. Rep. 406. *Bullock v. Taylor*, 39 Mich. 137; s. c., 33 Am. Rep. 356, is against the above Texas doctrine, but *Bank of British America v. Ellis*, U. S. C. Ct., Or., June 26, 1880; 21 Alb. L. J. 238, is in harmony with it.

APPEAL OF BREDIN.

(23 Penn. St. 241.)

Contract — validity — judgment in consideration of compounding felony.

A judgment confessed in consideration of the suppression of a prosecution for forgery is void,* and should be set aside on the motion of the person confessing it.

APPLICATION to open a judgment. The opinion states the facts. The application was denied below.

John M. Thompson and *W. D. Brandon*, for appellants.

John M. Greer, for appellee.

TRUNKY, J. The maxim, "*Nemo allegans suam turpitudinem audiendus est*," is good in its use, and the authority of a long line of decisions prevents its abuse. In *Collins v. Blantern*, 2 Wils. 341, a leading case, it was decided that illegality may be pleaded as a

* See *Haines v. Lewis*, ante, 202.

Appeal of Bredin.

defense to an action on a bond, and so it has been held in England and this country ever since. The bond in that case was given as an indemnity for a note entered into by the obligee for the purpose of inducing a prosecutor of an indictment for perjury to withhold his evidence. After speaking of the transaction as one to gild over and conceal the truth, the court said, "This is an agreement to stifle a prosecution for willful and corrupt perjury, a crime most detrimental to the Commonwealth; for it is the duty of every man to prosecute, appear against and bring offenders of this sort to justice." "This is a contract to tempt a man to transgress the law, to do that which was injurious to the community; it is void by the common law, and the reason why the common law says such contracts are void is for the public good." Had the defendant not been heard the court would have known nothing of the facts; they were not set out in the bond, the plaintiff was not compelled to show them in making out his case, and on the face of the bond he was entitled to recover; all that which proved it a void contract was shown by the defendant. So in the late case of *Ham v. Smith*, 6 Norris, 63, the corrupt, immoral and forbidden contract appeared in the proofs adduced by the defendants; the plaintiff made his case by showing the note, the fair-looking fruit of the illegal bargain. Notwithstanding the maxim, it has been settled that when a contract or deed is made for an illegal purpose, a defendant against whom it is sought to be enforced may show the turpitude of both himself and the plaintiff, and a court of justice will decline its aid to enforce a contract thus wrongfully entered into. The principle depends on the public good, not on the merit of the defendant, whose hand is as foul as the plaintiff's. Public policy requires that he be heard, and if the contract be void, his relief is an incident. *Swan v. Scott*, 11 S. & R. 153, is no exception. There the suit was on a bond, given in satisfaction of an award of arbitrators, which had become a judgment; and the defendant proposed to go behind the judgment and show the illegal contract on which the award was obtained. *Held*, that he could not, and DUNCAN, J., remarked, "The test, whether a demand connected with the illegal transaction is capable of being enforced at law is, whether the plaintiff requires the aid of the illegal transaction to establish his case." It is manifest the judgment was conclusive, though obtained in a suit on an illegal contract, and the remark strictly fitted the facts in that case, without infringing on the

Appeal of Bredin.

rule. Wherever that test has been quoted and applied, it will be found there was a good consideration for the contract in suit before reaching back to the alleged illegal one.

Where the public is not interested, the maxim has its full force, and the law leaves the parties as they placed themselves. Obligors in an instrument under seal, made for the purpose of defrauding the obligee's wife, cannot shield themselves by alleging their own fraud; for this does not belong to the class of contracts forbidden by statute or public policy. *Evans v. Dravo*, 12 Harris, 62; *Hendrickson v. Evans*, 1 Casey, 441. On like principle, voluntary conveyances and contracts made to defraud creditors, though void as to them, are good and binding between the immediate parties. These are avoided by the statute of 13 Elizabeth, for the benefit of creditors, but not as to the parties. *Hershey v. Weiting*, 14 Wright, 240; *Blystone v. Blystone*, 1 P. F. Smith, 373. "That a collusive contract binds the parties to it is a principle which commends itself no less to the moralist than to the jurist; for no dictate of duty calls on a judge to extricate a rogue from his own toils." *Stewart v. Kearney*, 6 Watts, 453. In all such cases the actor is met by the maxim, "*In pari delicto melior est conditio possidentis.*"

Forgery, or the *crimen falsi*, is an infamous offense. It is classed with other infamous felonies and misdemeanors, the compounding of any of which is a misdemeanor punishable by fine and imprisonment. Act March 31, 1860, § 10, Pamph. L. 387. Under section 9, of the Criminal Procedure Act of 1860, Pamph. L. 432, no magistrate or court can lawfully permit a settlement of a prosecution for forgery, on satisfaction being made to the party complaining, for infamous crimes are excepted from its operation. The legislature committed no such inconsistency as enacting two acts of the same date, one of which prohibits the settlement of forgery under a severe penalty, and the other authorizing it, if the complaining party acknowledges satisfaction.

Cheats by false pretenses are among the cases authorized to be settled by the 9th section of the Criminal Procedure Act, and therefore *Steinbaker v. Wilson*, 1 Leg. Gaz. 76, has no application to the question now pending. And the settlement of cases within that section is not touched by the principles applicable to the compounding of an infamous crime.

Dorsey charged McCullough with forgery, and conducted the

prosecution to his indictment and acquittal. After the indictment, and before the acquittal, a bargain was struck, the judgment-note given, Dorsey's claim against McCullough satisfied, and Dorsey was not to appear and testify in the forgery case. He saw the Commonwealth fail, for he did not answer to testify, though present. It cannot be doubted that the abandonment of the prosecution and failure to testify entered into the agreement. The note was given for the debt and for the acquittal — neither promise nor consideration is divisible. If any part of an indivisible promise, or any part of an indivisible consideration for a promise, is illegal, the whole is void. *Filson v. Himes*, 5 Barr, 452.

Agreements founded upon the suppression of criminal prosecutions are void; they have a manifest tendency to subvert public justice. 1 Story Eq., § 294. It is the nature of the crime, not so much whether it be felony or misdemeanor, which is to be considered. Many felonies are not so enormous as some misdemeanors. The law recognizes this in their punishment. For instance, the maximum of imprisonment for one convicted of forgery is ten years, of larceny three. Stifling a prosecution for forgery, though an offense of same grade as compounding divers felonies, seems to be a graver offense than compounding some felonies. It comes within the rule, that where the welfare of society and the vindication of the law are the chief objects, the defendant may give in evidence the illegality of the contract as a bar to a suit to enforce it; and this to prevent the evil which would be produced by enforcing the contract or allowing it to stand. Shall these objects be thwarted, and the evil follow which the law designs to prevent, because of a judgment confessed by virtue of a warrant which is but a part of the criminal transaction?

It was said by the present chief justice in *Hopkins v. West*, 2 Norris, 109. "There is no difference in legal effect between a judgment confessed, or for want of appearance or plea, and a judgment on the verdict of a jury. The court in which the judgment is rendered will indeed open one of the former kind, and let the defendant into a defense in a proper case and upon equitable terms." In Pennsylvania it has always been the right of a defendant in a judgment confessed by virtue of a warrant of attorney to petition that it be opened for cause. This right was so well respected by the courts that there was no occasion for legislation providing for appeal from refusal to open till a recent date. The entry of judg-

Cooper v. Pogue.

ments, either by attorneys or prothonotaries, on judgment-notes, is very common. These though having the same effect as if on the verdict of a jury, while they stand, in fact, never were the results of adjudication. To hold that such a judgment entered on an immoral and illegal obligation, part of a transaction subversive of public interests, shall be deemed an executed contract, with absolute right in the plaintiff to judicial process for collection, would be shocking to every man's sense of justice. The argument is that the judgment shall stand, for the plaintiff need only show the note, and the defendant, as actor, will not be heard alleging his own and the plaintiff's turpitude in an application for opening the judgment. In one sense the plaintiff is an actor—he caused confession of judgment on the void instrument, and uses the process of the law to collect the money agreed to be paid for its violation. The reason of the rule which allows a defendant to plead and prove the illegality of a contract in bar of a suit upon it demands that he be heard in an application to open a judgment so confessed. His rights are of secondary importance, and he is not heard for their vindication. It is the duty of the court, on proper showing, to open such a judgment, to the end that there may be a trial as if suit had been originally commenced on the note or other obligation on which the judgment was entered. In this way the law may be vindicated and the interest of the Commonwealth conserved.

The order and decree discharging the rule to show cause why judgment should not be opened, reversed, and now the said rule is made absolute; the record to be remitted for further proceedings. Appellees to pay costs of this appeal.

COOPER V. POGUE.

(98 Penn. St. 254.)

Will — construction — life estate or fee?

A will contained the following clause: "To my beloved wife P. (so long as she remains my widow) I give all the income of the home farm, on which I now live, containing two hundred acres, more or less, with all the tenements and appurtenances belonging thereto, together with all the products arising therefrom; also, the mansion house in which I live, together with all be-

Cooper v. Pogue.

longing to it, and all that is in it, or about it, I give to my beloved wife P., the same to be hers and to belong to her forever." *Held*, that the widow took an estate in the realty for life and widowhood, and an absolute estate in the personal property.*

EJECTMENT. The opinion states the point. The plaintiff had judgment below.

A. W. & M. C. Acheson, for plaintiff in error.

D. F. Patterson and Alexander Wilson, for defendants in error.

MERCUR, J. This contention arises under a clause in the last will and testament of Robert Pogue. It is this: "To my beloved wife, Sarah Pogue (so long as she remains my widow), I give all the income of the home farm, on which I now live, containing two hundred acres, more or less, with all the tenements and appurtenances belonging thereto, together with all the products arising therefrom, also the mansion house in which I live, together with all belonging to it, and all that is in it, or about it, I give to my beloved wife, Sarah Pogue, the same to be hers and to belong to her for ever."

The question is, what estate did Sarah Pogue take in the home farm and mansion house thereon?

In the clause quoted the words "I give" are used twice, once before the use and product of the real estate are devised, and once after the personal estate is specified. It begins by declaring, "to my beloved wife, so long as she remains my widow, I give all the income of the home farm * * * with all the tenements and appurtenances belonging thereto, together with all the products arising therefrom, also the mansion house in which I live." If the clause ended here, there would be no reason to doubt either the intention of the testator or the legal effect of the devise. In clear and express language the income and profits of the lands were given to her only so long as she remained his widow. There is not only an absence of words necessary to pass a fee, but there is the express use of words giving a less estate. The gift is unequivocally limited to the time that she shall remain his widow. At the latest the interest devised ended at her death; but would end sooner in case of her marriage. While a devise of the income and profits of land is a devise of the land itself, yet it is a devise of it for no longer

* See *Green v. Hewitt*, ante, p. 108.

Cooper v. Pogue.

period of time than the testator gave the income and profits. *France's Estate*, 25 P. F. Smith, 220. The income and profits having been limited to the duration of her widowhood, her estate in the land was limited to the same period of time. She took an estate for life, because it might possibly last for life, but liable to be determined sooner, on the happening of the contingency of her marriage. 2 Bl. Com. 121; 4 Kent Com. 26, *Rodgers v. Rodgers*, 7 Watts, 15. It is not a devise upon condition, nor one the object of which is to impose a penalty or forfeiture; but it is a conditional limitation which marks the extent of the duration of the interest given. *Bennett v. Robinson*, 10 Watts, 348.

The clause proceeds, "together with all belonging to it, and all that is in it, or about it, I give to my beloved wife, Sarah Pogue, the same to be hers and to belong to her forever." "It" manifestly refers to the mansion house stated in the preceding sentence, and the property in and about the house he gives to her. This evidently means personal property. How does he give it? Not as he has given the products of the land so long as she remains his widow, but "to be hers and to belong to her forever." The distinction is thus clearly made between the real and the personal estate. The former is given to her for life, the latter forever. This view gives effect to the letter and spirit of the will. It would be giving an unnatural interpretation to the clause to say the latter "I give" refers to the use and products of the lands. They had already been given in distinct and appropriate language. It would do still greater violence to the reading of the will to hold that the gift "to her forever," which following immediately after the personal estate, had any reference to that other property that he had just said she should have only so long as she remained his widow. As the last part of the clause reasonably and naturally applies to the personal estate only, we will not assume that it was intended to contradict the language he had used in regard to the real estate, nor to change the estate therein given. We see nothing obscure or ambiguous in the will. It does clearly appear therein, that the testator intended to devise to his wife an estate in the land less than a fee. The fact that he did not devise the remainder is insufficient to overcome or change the effect of the language giving his wife a life-estate only. It follows that the parol evidence offered was insufficient to change its legal effect, and the title of the testator's heirs must prevail.

Judgment affirmed.

Pittsburg and Connellsville Railroad Company v. Sentmeyer.

PITTSBURG AND CONNELLSVILLE RAILROAD CO. v. SENTMEYER.

(98 Penn. St. 276.)

Master and servant — contributory negligence — low bridge.

An employee of a railroad company, who rides on the top of a freight train, voluntarily and out of the line of his employment, and while there is struck and killed by a low bridge, the situation and character of which he is acquainted with, is guilty of such contributory negligence as prevents a recovery.*

ACTION of damages for death of person caused by negligence. The opinion states the facts. The plaintiff had judgment below.

D. Kaine and Wm. H. Coldren, for plaintiff in error.

C. E. Boyle, for defendants in error.

GORDON, J. Where a railroad company voluntarily subjects its employees to dangers which it ought to provide against, and an accident happens to an employee from a want of proper provision against such dangers, the company is undoubtedly liable. But on the other hand, it is not liable for accident happening from the ordinary risks and dangers of the business, for it is a legal presumption that the servant assumed the risk of such accidents when he entered the service of the company. *Patterson v. Railroad Co.*, 26 P. F. Smith, 389. Again, we may further extend this rule by saying, that the servant or employee assumes the risk of all dangers, however they may arise, against which he may protect himself by the exercise of ordinary observation and care. Furthermore, the master's liability arises from the fact that he subjects his servant to dangers which in good faith he ought to provide against, but he is not responsible for those dangers to which the servant voluntarily subjects himself, though he does so without carelessness or breach of duty.

These principles govern this case. The bridge, by which young Sentmeyer was killed, was fifteen feet and six inches in height from the top of the railroad rails, whilst the height of the cars varied from

* To same effect, *Rains v. St. Louis, etc., Ry. Co.* (71 Mo. 164), 36 Am. Rep. 452.

Pittsburg and Connellsville Railroad Company v. Sentmeyer.

nine to ten and one-half feet ; thus, for the lower cars the bridge was sufficiently high, but for the higher ones, several inches too low. Sentmeyer had been, for several months previous to the accident, employed as flagman on one of the trains of this road, and therefore had, or ought to have had, knowledge of the height of the cars used upon it and also of the height of this bridge. These were matters which addressed themselves to his own observation, and as we have already said, for the prudent exercise of that observation he was responsible. But did he give such attention to the dangers to which he was exposed as an ordinarily prudent man should have given to them ? Certainly not, or the accident would not have occurred. He had almost every day for a month passed and repassed under that bridge ; he knew just where to look for it, and if he paid any attention to it whatever, he must have known that when standing at full length upon a car of medium height, say nine feet six inches, there was but an inch or two between the bridge and the top of his head. What shall we say, then, of that man's prudence who would thus risk his life on the difference of two or three inches in the height of a car ? But the court below held the company rigidly to what it regarded as its duty in regard to the bridge, without any reference to the duty resting upon the deceased to give heed to a known and obvious danger and prudently to care for himself. "If," reads the plaintiffs' first point, "the jury believe from the evidence that it was required of the employees of the company, of the same class as Sentmeyer, as was usual and customary for them to be on the top of freight and stock cars whilst in motion, and the defendant permitted a bridge to be erected and maintained over its track of a height insufficient to allow the safe passage of persons while on the top of such freight or stock cars, and that while on the top of such cars Sentmeyer was knocked off and killed, while in the service of the company ; they may find that the death of Sentmeyer was caused by such negligence of the company, as would make it liable to the plaintiffs in damages therefor." This point was affirmed without qualification, and it amounts to an instruction that the defendant was bound to have all the bridges, crossing its road, of such a height that whether its employees were careful or negligent no damage could result to them therefrom.

But what is the logical result of a doctrine such as this ? Is it not, that the company must not only guard its servants from prob-

Pittsburg and Connellsville Railroad Company v. Sentmeyer.

able but also from possible dangers, and that it must place no dependence on their care and skill even in the matter of their own preservation and personal safety? That it must provide against this very negligence and become an insurer of their limbs and lives? We need not say this will not do; that neither natural nor artificial persons can bear a burden such as this, neither ought they so to do. When men are hired something must be predicated of their judgment and prudence, and hence when the employer furnishes them with tools and appliances, which though not the best possible may by ordinary care be used without danger, he has discharged his duty and is not responsible for accidents.

But again: the defendant was liable for the consequences of such dangers as it subjected the employee to, and not for those to which he subjected himself. He was the flagman of the preceding train, and his only duty on the train from which he was killed, was to ride upon it until he overtook his own train. His business was simply to take care of himself, and the whole duty of the company was discharged by affording him a safe place to ride. On that train there were two such places, the caboose and the locomotive; he might have taken either and been perfectly safe; he took neither, but chose the top of the cars, the place of all others the most unsafe. No duty to the company called him to this position; he chose it of his own free will; he put himself in the place of danger and the direct consequence of this, his own voluntary act, was the loss of his life. For this, surely, the company was not liable, for it required of him no such risk. It furnished him with a safe conveyance, all it was at that time bound to do, and if he chose to turn that safe conveyance into one of danger it was no fault of the company.

As this disposes finally of the whole case, we will not dwell on any particular exceptions.

Judgment reversed.

STEBBINS V. COUNTY OF CRAWFORD.

(22 Penn. St. 280.)

Voluntary agreement — promise by public officer to pay amount omitted by mistake on settlement.

A county treasurer's accounts were settled and became a judgment, final and conclusive. Subsequently an innocent error was discovered in favor of the county, and the treasurer orally promised his successor to pay the amount. *Held*, an enforceable promise.

ASSUMPSIT. The head-note states the point. The plaintiff had judgment below. CHURCH, P. J., gave an opinion below, in which among other things he said:

"The facts are that two years after the auditor's report was filed, and which was unappealed from, and hence final and conclusive, and binding as a judgment upon all parties, the defendant, upon the discovery of two important clerical and mathematical errors, admitted the errors, and promised to pay the same definitely, specifically and unconditionally. Was there a moral obligation resting on the defendant to pay this money, sufficient for a consideration to support this promise, or was it void as being mere *nudum pactum*? From an examination of the authorities, we find the rule to be this: A moral obligation is sufficient to support an express promise, where there has been a pre-existing obligation which has become inoperative by positive law. Express promises, founded on pre-existing equitable obligations, may be enforced as founded on good consideration. They merely remove an impediment erected by law to the recovery of debts honestly due, but which the statute law and public policy protect the debtors from being compelled to pay.

"The case of debts barred by the Statute of Limitations, of debts incurred by infants, of debts of bankrupts, are illustrations of this rule. In all these cases there was originally a *quid pro quo*, and according to the principles of natural justice, the party receiving ought to pay, but the legislature has said he shall not be coerced. Then comes the promise to pay the debt that is barred; the debt of the infant, the debt of the discharged bankrupt, to restore to his creditor what by the law he had lost. In all these cases there is a

moral obligation founded upon antecedent valuable consideration. Such promises therefore have a sound legal basis. They are not promises to pay something for nothing, not naked pacts, but the voluntary revival or creation of obligations which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. Per PARKER, C. J., in *Mills v. Wyman*, 3 Pick. 207. To the same effect is *Willing v. Peters*, 12 S. & R. 177; *Hampbill v. McClimans*, 12 Harris, 367; *Kennedy v. Ware*, 1 Barr. 445; *Paul v. Stackhouse*, 2 Wright, 302. Now, applying this rule to the facts in this case, what do we have? An actual pre-existing debt owing by this defendant to the plaintiff — a debt for trust moneys, which in *foro conscientiae* is of a higher character than the ordinary debts which arise on account of dealings between individuals. This debt is barred by positive law, by a judgment entered, in which the debtor is unwittingly but none the less positively released. According to the common sense and feeling of mankind, the debt exists until it is actually paid; the mind of the defendant assented to this principle. He felt the obligation of the unsatisfied debt, and in the language of the verdict, specifically and definitely admitted it, and positively and unconditionally promised to pay it. There can be no doubt therefore that this moral obligation was a sufficient consideration upon which to base this promise of the defendant to pay the debt, and the legal arbitrator did not err in applying these principles and answering defendant's points as he did.

"The defendant's seventh point was correctly answered. The clerk to the county commissioners and the county treasurer are both functionaries recognized by law, and the promise of defendant might with propriety be made to them, or at least to the treasurer. They were not engaged in the settlement or adjustment of the affairs of the county, and even if they were, it is difficult to see why the treasurer could not receive the defendant's promise. It is made the duty of the treasurer by law to receive all moneys due or accruing to the county.

"This money in the hands of defendant was due and accruing to the county, and if it could or would have to be paid to him he could certainly receive a promise of defendant to pay it. As well say the cashier of a bank, or the treasurer or receiving officer of any corporation could not receive the promise of a debtor to the bank or corporation to pay a debt owing, as to say the county

Stebbins v. County of Crawford.

treasurer cannot receive the promise of a debtor to the county to pay a debt justly due it. In this case the treasurer is not an actor; he is but the passive recipient of the promise to pay. In this respect he was the agent of the political corporation, the county, and this political body has the right to reap the benefit of the defendant's promise made to pay them through its agent, the county treasurer, and to maintain this suit to enforce performance of that promise."

D. C. McCoy & Son, for plaintiff in error.

Thomas Roddy and S. Newton Pettis, for defendant in error.

GORDON, J. To the well-written and carefully considered opinion of the learned judge of the court below, we can add but little, except the approval of this court. That a moral obligation is sufficient to support an assumption to pay a debt, which cannot be collected by reason of the intervention of some positive law, as the Statute of Limitations, the operation of a judgment, or a discharge in bankruptcy, is a doctrine now so well established, that a discussion of it would be mere waste of logic. In *Anspach v. Brown*, 7 Watts, 140, it is admitted that there is an obligation in morals to pay a debt barred by a judgment, which will support an express promise to that effect. Such a debt, it is true, is put upon higher footing than one barred by the Statute of Limitations, for it is said, there must be not only an acknowledgment of the debt, but a distinct and formal promise to pay; nevertheless, when these conditions are complied with, the promise is binding. What then though the auditor's report was equivalent to a judgment? That there was a clear mistake in it of some \$1,700 is not denied; and that Stebbins acknowledged that mistake, and clearly and unconditionally promised to pay the amount thus discovered to be due the county, is found by the legal arbitrator.

But it is objected, that this promise was made to the clerk of the commissioners and to the county treasurer, and is therefore not binding upon the defendant. But as both these persons were county officers, we cannot see why the assumption to either of them would not be good, especially to the latter, as he was the only one who had power to receive the money and receipt for it. As was well observed by the court below, as well might you say that the cashier

Baughman v. Shenango and Allegheny Railroad Company.

of a bank, or the treasurer of a corporation of any kind, could not receive the promise of a debtor to pay a debt due to such bank or corporation. But the officers above named, are not more nearly connected with the interests of their several institutions, than are the county clerk and treasurer with the interests of the county; there is therefore quite as much reason that a promise to the latter, to pay a debt due the county, should be binding, as to the former, to pay a debt due a bank or other corporation.

The judgment is affirmed.

Judgment affirmed.

BAUGHMAN V. SHENANGO AND ALLEGHENY RAILROAD COMPANY.

(92 Penn. St. 335.)

Negligence — railroad crossing highway — when duty of person on highway to stop and listen does not arise.

The plaintiff driving over a railway at a highway crossing, his horse caught his foot between the rail and planking, and fell down. For two minutes the plaintiff was busied in trying to disengage the foot, when a train passing broke the horse's leg. *Held*, that the rule that the plaintiff should have stopped, looked and listened before driving on to the track was not applicable. (*See note, p. 691.*)

ACTION of damages for negligent injury to a horse. The opinion states the facts. The defendant had judgment below.

S. H. Miller and B. Magoffin, Jr., for plaintiff in error.

S. Griffith and Stranahan & Mehard, for defendant in error.

PAXSON, J. [Omitting an unimportant consideration.] The second and third assignments present a graver question. The court below nonsuited the plaintiff upon the ground that he did not stop and look and listen before attempting to cross the track. The rule invoked is a valuable one and sustained by several well considered cases, among which may be mentioned, *Railroad Co. v. Heileman*, 13 Wright, 60; *Hanover Railroad Co. v. Coyle*, 5 P. F. Smith, 396, and *Pennsylvania Railroad Co. v. Beale*, 23 id. 504;

Baughman v. Shenango and Allegheny Railroad Company.

s. c., 13 Am. Rep. 753. We do not propose to depart from this principle nor to weaken its force. We are unable to see its applicability to this case, however. The injury, as developed by the plaintiff's testimony, was not the result of a failure to observe the rule. Had he stopped, looked and listened, it is not probable he would have seen or heard the train, for the reason that it was too far off to have been patent to any of the senses. The trouble was, that the horse which plaintiff was driving caught his foot in the space between the rail and the plank at the crossing, and fell down on the track. The plaintiff got out of the buggy and endeavored to get his horse upon its feet again. But this was not an easy task, as one of its feet was fast. After working unsuccessfully in this manner for about two minutes, he told his wife to get out of the buggy. She did so, and shortly thereafter heard the cars coming, upon which she ran up the road to meet them, signalling them at the same time to stop. The warning came too late, and the train passed over one leg of the horse, and damaged the harness and buggy to some extent. There was evidence that the track was out of order at the point where the accident occurred; that the flange way was too wide — one witness says four inches and five-eighths — and that other horses had been caught in the same way before. The true question in the case therefore was, whether the company were guilty of negligence in allowing the track at the crossing to be in an insecure condition, and this question should have been submitted to the jury.

Judgment reversed, and a *venire facias de novo* awarded.

Judgment reversed.

NOTE BY THE REPORTER. — In *Pakalnsky v. N. Y. Cent. etc., R. Co.*, 83 N. Y. 494, the action was for injury to plaintiff, a boy ten years old, caused by being run over early in the evening by defendant's engine at a street crossing. It was claimed that no bell was rung when the engine approached the crossing. It appeared, however, that plaintiff saw the engine, which was backing, approaching and tried to run across in front of it, but his foot caught between a rail and the planking and he fell down and was run over. *Held*, that as the object of ringing a bell upon an engine is to warn people of its approach, it was not negligence contributing to the accident to omit to ring it, as plaintiff had all the notice that ringing would have given. A flagman was usually kept at this crossing, but he was absent on this occasion. It was not the duty of defendant to keep a flagman at that crossing and plaintiff did not know that one had been usually kept. *Held*, that there was no negligence on the part of the defendant in this particular. *McGrath v. N. Y. Cent. etc., R. Co.*, 59 N. Y. 468; s. c., 17 Am. Rep. 359; s. c., 63 N. Y. 522. The regular fireman was not on the engine at the time, and there was no light on the rear of the engine and it was dark. *Held*, as it appeared that plaintiff plainly saw the engine approaching, there was no negligence. Three judges dissented.

COMMONWEALTH V. KETNER.

(98 Penn. St. 373.)

Criminal law — embezzlement from National bank.

Embezzlement from a National bank is not punishable by a State court of Pennsylvania.

HABEAS CORPUS. The opinion states the case.

William A. Marr, James Ryon, John W. Ryon and William P. Mann, for relator.

A. W. Schalck and Hughes & Farquhar, for respondent.

PAXSON, J. It appears by the return to this writ, that the relator is held to answer an indictment in the court of quarter sessions of Schuylkill county, charging him, as cashier of the First National Bank of Ashland, with having embezzled the funds and property of said bank. There are three counts in the indictment, each varying the form of the charge, but not essentially changing its substance.

It is almost needless to say, that a habeas corpus is not a writ of error. Hence, if the court below had jurisdiction of the offense, we cannot correct its rulings in this proceeding, however erroneous they may be. On the other hand it is equally clear, that if the relator is being prosecuted for a matter which is not an indictable offense by the law of Pennsylvania, or one over which the court below has no jurisdiction, it would be our right as well as our plain duty to discharge him. No authority is needed for so obvious a proposition.

Embezzlement by the cashier of a bank is not a common-law offense. This indictment must rest upon some statute of this State, or it cannot be sustained. Has it such support? As preliminary to this question, it is proper to say, that section 5209 of the United States statutes, provides specifically for the punishment of cashiers and other officers of National banks, who shall be guilty of embezzling the moneys, funds or credits of such institutions. The relator

Commonwealth v. Ketner.

was not indicted under this section, and could not have been in a State court. Our own legislation upon this subject may be briefly stated.

[Omitting this.]

We are spared further comment upon these acts for the reason that they have no application to National banks. Neither of them refers to National banks in terms, and we must presume, that when the legislature used the words, "any bank," it referred to banks created under and by virtue of the laws of Pennsylvania. The National banks are the creatures of another sovereignty. They were created and are now regulated by the acts of Congress. When our acts of 1860 and 1861 were passed, there were no National banks, nor even a law to authorize their creation. When the act of 1878 was passed, Congress had already defined and punished the offense of embezzlement by the officers of such banks. There was therefore no reason why the State, even if it had the power, should legislate upon the subject. Such legislation could only produce uncertainty and confusion, as well as a conflict of jurisdiction. In addition, there would be the possible danger of subjecting an offender to double punishment, an enormity which no court would permit, if it had the power to prevent it.

An act of assembly prescribing the manner in which the business of all banks shall be conducted, or limiting the number of the directors thereof, could not by implication be extended to National banks, for the reason, that the affairs of such banks are exclusively under the control of Congress. Much less can we, by mere implication, extend penal statutes like those of 1861 and of 1878 to such institutions.

The offense for which the relator is held is not indictable either at common law or under the statutes of Pennsylvania. We therefore order him to be discharged.

So ordered.

WOOD'S APPEAL.

(92 Penn. St. 379.)

Executor — pledge of estate securities for individual debt.

One of several executors pledged to his broker, as collateral security for his own debt, certificates of stock belonging to the estate. The broker pledged them to a third, who advanced money on them supposing the broker to be the owner. The transfers showed on their face that the title came from the executor. *Held*, that the other executors could not recover the stock without paying those advances.*

BILL to recover stock. The head-note sufficiently states the facts. The bill was dismissed below.

J. B. Townsend and R. C. McMurtrie, for appellants.

Lewis Walm Smith and Wm. Henry Rawle.

TRUNKEY, J. The able and elaborate report of the master so well sustains his conclusions and the decree of the court, as to obviate labor in affirmance.

The appellants concede 1. That where the owner sells stock and gets his price, and delivers the certificate, together with a blank bill of sale and irrevocable power of attorney, signed by himself, the title vests in the purchaser; and 2. When a living owner signs such papers in blank, if he has not actually sold and got his price for the stock, by intrusting them to another, he delegates all his powers in respect to the stock, which being unlimited, he by estoppel will lose his property if his agent abuses his confidence. They deny that such papers pass title by delivery, and allege they are only symbols in the hands of the holder, affording no presumption that he is the owner of the stock, but are consistent with an agency to act for the signer.

The rights of a *bona fide* holder, as against the true owner of the stock, to whom the apparent owner has either sold or pledged, do not depend on a negotiable character in the certificates, but rest on another principle, "namely, that one who has conferred

* To same effect, *Carter v. Manuf. Nat. Bk. of Lewiston* (71 Me. 443), 36 Am. Rep. 383.

Wood's Appeal.

upon another by a written transfer all the *indicia* of ownership of property, is estopped to assert title to it as against a third person, who has in good faith purchased it for value from the apparent owner." As a general rule, the vendor or pledgor can convey no greater right or title than he has. Simply intrusting the possession of a chattel to another as a depositary, pledgee or other bailee, is insufficient to prevent the real owner reclaiming his property in case of an unauthorized disposition of it by the person so intrusted. The mere possession of chattels, without evidence of property or authority to sell from the owner, will not enable the possessor to give good title. But if the owner intrusts to another the possession of property, and also written evidence of title and power of disposition over it, as respects innocent third persons, he is deemed as intending it shall be disposed of at the pleasure of the depositary. If there be conditions on which this apparent right of control is to be exercised, not expressed on the face of the instrument, the case, in principle, is like that of an agent who receives secret instructions qualifying or restricting an apparent absolute power. If the owner of the stock voluntarily give certificates with blank assignment and power to make transfers, to his brokers, who betray the confidence reposed in them, such owner must suffer the loss, rather than innocent strangers whose money the brokers were thereby enabled to obtain. The principle applies to pledges of stock, and one who purchases from the pledgee may hold against the pledgor. And if the pledgee pledge it to secure payment of his own debt, the second pledgee may hold it as security till his debt be paid. "A person loaning money on such certificate and power has a right to believe that the borrower from whom he receives them has an absolute right to pledge the stock." By commercial usage, a certificate of stock accompanied by an irrevocable power of attorney, either filled up or in blank, is in the hands of a third party presumptive evidence of ownership in the holder. And where the party in whose hands the certificate is found is a holder for value, without notice of any intervening equity, his title cannot be impeached. *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41; s. c., 14 Am. Rep. 173; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; s. c., 7 Am. Rep. 341; *Prall v. Tilt*, 28 N. J. Eq. 480; *Bridgeport Bank v. New York & New Hampshire R. R. Co.*, 30 Conn. 275; *Mount Holly Turnpike Co. v. Ferree*, 2 C. E. Green, 117.

The doctrine of these and kindred cases is not in the least shaken

or qualified by the late decision in *Shaw v. The Merchants' National Bank of St. Louis*, 101 U. S. 557, where the distinction between negotiable paper and bills of lading is pointed out with great clearness. Between such paper and certificates of stock, the distinction may be as wide. Perhaps, under similar circumstances, a like rule would be applied to the holder of a stolen certificate as to the holder of a stolen bill of lading, but such is not this case. There the court say, "It may be that the true owner, by his negligence or carelessness, may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness. But the present is no such case. It is established by the verdict of the jury that the bank did not lose its possession of the bill of lading negligently. There is no estoppel therefore against the bank's right." The bill of lading having been stolen without fault in the owner, he was held entitled to recover against a purchaser who had reason to believe that his vendor was not the owner, but held it to secure the payment of an outstanding draft. Nothing in the case tends to show that if the owner had voluntarily given that bill of lading to another, he could have recovered against a purchaser for value who took it in good faith.

We are convinced that the master adopted the true principle applicable to the papers in question ; he neither held that they were negotiable, nor that it was a mere matter of the actual agency or authority of MacDowell & Wilkins.

Do the same rules apply to these stocks as if they belonged to a living owner? An executor holds under a trust ; he is the minister or dispenser of the goods of the dead. He has the same property in the personal effects as the deceased had when living. It is a general rule of law and equity, that an executor has an absolute power of disposal over the personal effects of his testator, and they cannot be followed by creditors nor legatees into the hands of the alienee. This results from the fact that in many instances the executor must sell in order to perform his duty in paying debts, etc. ; and no one would deal with him if liable afterward to be called to an account. Co-executors are regarded in law as an individual person ; and the acts of any one of them, in respect to the administration of the effects, are deemed to be the acts of all ; as where one releases a debt or settles an account of a person with the deceased, or surren-

Wood's Appeal.

ders a term, or sells the goods and chattels of the estate, his act binds the others. An exception to this general power will be found in those cases only when collusion exists between the executor and the purchaser. That the executor may waste the money is not alone sufficient to invalidate the sale; it must further appear that the purchaser participated in the *devastavit* or breach of duty in the executor. Thus, when the person to whom the executor passes the property knows that the executor is acting in violation of his trust and in fraud of those interested in the due administration of the assets, the fraud vitiates the transaction, and the attempted transfer is void. These familiar elements, the base of the master's reasoning, are its sure support.

Were McDowell & Wilkins defendants instead of their pledgees, the appellants' argument would be irresistible, for they participated in the wrongful act of George R. Wood. As executor, he could not make a valid sale or pledge of the stock as a security for or in payment of his own debt to them; the transaction itself gave them notice of the misapplication and involved them as participants in the breach of duty. Where money was obtained on the security of stock belonging to an estate, the borrowers, sons of the testator, represented that they owned and had the right to pledge it, but the transfer was made by the executrix to the lenders, who gave her a receipt stating the purpose for which they held it, and that it was to be returned to the estate if their debt was paid, the transaction gave the lenders notice, and the trust was not divested. *Prall v. Hamil*, 28 N. J. Eq. 66.

An executor's duty is not like that of a trustee, in whom property is vested, not for administration or sale, but custody and management for his *cestuis que trust*. The party taking stock on pledge from such trustee deals with it at his peril, for there is no presumption of a right to sell it, as there is in the case of an executor. *Duncan v. Jaudan*, 15 Wall. 165; *Shaw v. Spencer*, 100 Mass. 382.

"The executor has the right to sell and transfer, and one who buys of him in good faith, and pays in money the price agreed upon, is not responsible for the application of the purchase-money:" per HUNT, J., *Leitch v. Wells*, 48 N. Y. 585. Letters of administration are always sufficient evidence of authority to transfer, because a sale and transfer of stock is in the line of the duty of an administrator. The powers of an executor or administrator differ from

Wood's Appeal.

those of an ordinary trustee ; the duty of the latter being custody and management, of the former to dispose of the personal property, to pay debts, etc. Executors may use specific legacies to pay debts if necessary. *Bayard v. Farmers and Mechanics' Bank*, 2 P. F. Smith, 232. The fact that the legal title to the stock was known to have previously been in the executor, and that the title of the holder appeared on its face to have been derived from him in his representative capacity, will not raise a suspicion, or put a purchaser on inquiry, for the reason that it is the executor's primary duty to dispose of the assets and settle the estate. *Prall v. Tilt*, *supra*. We think the master was right in holding "that the same principle which prevails in the case of an absolute owner applies in the case of an executor who invests the holder with apparent ownership."

The defendants had a right to infer that MacDowell & Wilkins were the owners of the stock, although the certificates showed title in Charles S. Wood, and the blank assignments and powers were signed by George R. Wood as acting executor. They found MacDowell & Wilkins clothed with apparent ownership. The testator had given George R. Wood the strongest expression of confidence in making him an executor of his will, thereby vesting absolute power in him to sell and transfer the stock in the line of his duty. He was acting executor. Neither his co-executors, nor others interested in the estate, had taken a step to prevent him from committing waste. The law casts no duty upon a purchaser to ascertain if the trusted executor of the decedent's will is mismanaging the estate in fraud of creditors or legatees. The defendants had no knowledge of the collusive transaction between the executor and MacDowell & Wilkins, nor reason to believe that they, the pledgors, were not the real owners, as they appeared. If it be that the perfidious conduct of the executor results in loss to innocent persons, either those interested in the estate or the pledgees of the stock, it must fall on those whose interest he betrayed.

Decree affirmed, at the cost of appellants, and appeal dismissed

Decree affirmed.

PAXSON, J., dissented.

Philadelphia City Passenger Railway Company v. Henrice.

PHILADELPHIA CITY PASSENGER RAILWAY COMPANY V. HENRICE.

(92 Penn. St. 481.)

Negligence — street railway — evidence of employees' hours of work — duty to stop car for persons approaching track.

A child sixteen months old was injured by being run over by a street railway car. The court admitted evidence of how many hours the drivers and conductors were daily employed, in order to show that the driver was physically unable to discharge his duty at the time. *Held*, error. The court charged that if the driver saw the child in the street, approaching the car, and in such close proximity, that the child might reach the track before the car passed, it was negligent not to stop the car. *Held*, error. (*See note*, p. 701.)

ACTION of damages for personal injury by negligence. The head-note and opinion state the case. The plaintiff had judgment below.

D. W. Sellers, for plaintiff in error.

M. H. Stutzbach and *Benjamin H. Haines*, for defendant in error.

PAXSON, J. The first, second and fourth assignments relate to the same subject, and may be considered together. The first and second allege error in the admission of evidence on behalf of the plaintiff below to prove the hours of service required by the defendant company of its drivers and conductors, whilst the fourth relates to the instructions of the court upon said evidence.

The fact to be proved was, whether the driver of car No. 127 had been guilty of negligence upon the occasion in question in consequence of which the child, Charles Henrice, had been run over and injured. Was the evidence objected to of such a character as tended to prove this fact? It was undoubtedly competent to prove the condition of the driver at the time of the accident occurred; that he was intoxicated, or absent, or for any other reason incompetent to attend to his duties. *Pennsylvania Railroad Co. v. Books*, 7 P. F. Smith, 339; *Mansfield Coal & Coke Co. v. McEnery*, 10 Norris, 185; s. c., 36 Am. Rep. 662. These were specific matters which might have been proved; but how the fact that other drivers

Philadelphia City Passenger Railway Company v. Henrica.

and other conductors were allowed only a certain number of hours for sleep and rest could affect the question of this particular driver upon this particular occasion is not apparent. It is easy to see however how such evidence might seriously influence the jury and increase the damages. When a fact is established in a cause by evidence, the jury may properly be allowed to draw therefrom such inferences as are logically deducible from it. Thus if it be shown that the driver was asleep or intoxicated at the time of the accident, a presumption of negligence would properly arise. But the fact from which such inference is to be drawn must first be established. It will not do to presume that he was in the condition referred to from some remote fact in no way connected with the case and upon this presumption base the additional presumption of his negligence. This would be to found a presumption upon a presumption, which is never allowed. A presumption should always be based upon a fact, and should be a reasonable and natural deduction from such fact. The true rule was correctly stated by Mr. Justice THOMPSON, in *Douglass v. Mitchell's Exrs.*, 11 Casey, 443: "That as proof of a fact, the law permits inferences from other facts, but does not allow presumptions of fact from presumptions. A fact being established, other facts may be, and often are ascertained by just inferences. Not so with a mere presumption of a fact; no presumption can with safety be drawn from a presumption: there being no fixed or ascertained fact from which an inference of fact might be drawn, none is drawn." What has been said applies to the charge of the court embraced in the fourth assignment, as well as to the offers of evidence. There was no evidence that the driver of car No. 127 was in any way rendered incompetent to perform his duties in a proper and careful manner by reason of the severity of his labors or the loss of rest and sleep. In the absence of such evidence we have but a mere presumption, and upon this it was not competent to construct the further presumption of his negligence.

There was also error in affirming the plaintiff's fourth point. The point is framed upon the assumption that the driver saw the child approaching the car. There is no evidence upon this point save that of the driver himself, and he says he did not see it until after the injury. It is possible he might have seen it had he been on the alert — some of the witnesses say so substantially — but the point is not so framed. But if he had seen the child "in the street

Philadelphia City Passenger Railway Company v. Henrice.

approaching the car, and in such close proximity that the child might reach the track before the car passed," it was still error to instruct the jury, as a matter of law, that it was negligence for the driver not to stop the car. The standard of duty in such a case was a shifting one, and for the jury, not a fixed rule, the same under all circumstances, and therefore for the court. It did not follow that the child would reach the car, and the point was framed upon the mere possibility of its doing so. From the driver's standpoint, assuming him to have seen the child, it may have appeared extremely improbable. It was a question for the jury to determine whether, under all the circumstances, it was his duty to stop. It was error to rule it as a matter of law.

Judgment reversed, and a venire facias de novo awarded.

NOTE BY THE REPORTER. — In *Walters v. C. R. I. & P. R. Co.*, 41 Iowa, 71, the court said: "Defendant assigned as error the giving of a portion of the fifth instruction, as follows: 'It is the duty of those intrusted with the running of railway trains to keep a reasonably vigilant lookout, and to use all proper care and caution to avoid injuries to persons who may be on the streets through which the track of the road passes. If the deceased was a child of two years old or less, and was unattended and could have been seen while on the track, or in the street, and in the immediate vicinity of the track, by those in charge of the train in time to stop it, then it was their duty to stop the train, and a failure to so stop would be negligence.' It cannot, we think, as matter of law be declared negligence to fail to stop a train when a child is simply seen in the immediate vicinity of the track. Negligence is usually a question of fact. If the position and employment of the child is such as to furnish a reasonable ground to apprehend that it will likely come upon the track and be subjected to injury, then reasonable prudence and care would require the stopping of the train, if necessary to avoid the injury. But whether the circumstances are such as to reasonably require a resort to such precautionary measures when the child is not upon the track, nor in a condition to be injured if he does not approach nearer the track, the jury should be allowed to determine as a fact in view of all the surrounding circumstances." But the court also say: "If an adult should be seen upon a railroad track in a dangerous situation, the engineer in charge of an approaching train would not be justified in running him down, although his being in that situation was an act of negligence. After becoming aware of his dangerous position, the engineer should use ordinary care, to prevent injury, and for a neglect to do so, the company would be liable. See *Shearm. & Redf. on Neg.*, § 86, and cases cited. True, the engineer would ordinarily have the right to assume that such person was possessed of the usual senses, and that he would heed the ordinary signals. And under certain circumstances, the exercise of ordinary care might require no more than the giving of the customary signals of approach. But in the case of an infant two years old, the rule must be different. Even conceding that the rules of contributory negligence, apply to him (which they do not, as we have seen), and that he is personally negligent in being upon the track, what is the duty of an engineer in charge of an approaching train, who sees him in this exposed condition? He cannot presume that the infant will heed any warnings, or that he will make any exertions for his own safety. All the exertions which are to be put forward must be employed by the engineer and others in charge of the train. Under such circumstances, can the demands of humanity be answered unless they, in the language of the instruction, 'use all the care and caution that they can command?' The instruction, it will be observed, does not measure the care and caution required by the ability of any other person. It simply demands that the person approaching shall use all

Shisler v. Vandike.

the care and caution *he* can command. Ordinary care varies with the circumstances. What would be ordinary care in the case of an adult might be gross negligence in the case of a young child. Fairly construed, the instruction under consideration, it seems to us is not erroneous."

SHISLER V. VANDIKE.

(98 Penn. St. 447.)

Negotiable instrument — promise to pay forged note — public policy.

A promise, by one whose indorsement on a note is forged, to pay the same is void as against public policy. (*See note, p. 704.*)

ACTION on promise to pay a note. The head note and opinion show the point. The plaintiff had judgment below.

Edwin S. Dickson and Nathan H. Sharpless, for plaintiffs in error.

P. F. Rothermel, for defendants in error.

GORDON, J. [Omitting an unimportant point.] The remaining question is, if George V. Shisler, or any one else, fraudulently indorsed the name of John V. Shisler, would an after-ratification render such indorsement good and available in the hands of good faith indorsers? The court below thought it would, and so instructed the jury. This instruction seems to us, in the first place, wrong in this, that we can find no evidence to warrant it. There was testimony, and abundance of it, that John had authorized the putting of his name upon the paper, but none whatever that he had subsequently ratified the indorsement, either by word or deed.

The question however remains, could the forged indorsement, conceding it to be such, be ratified and thus made good? This question must be answered in the negative, if we accept as authority the case of *McHugh v. Schuylkill County*, 67 Penn St. 391; a. c., 5 Am. Rep. 445.

This case is in point; there, as here, the question was whether there could be an after-ratification of a forged obligation, and it was held that there could be no such ratification. It is true, the dicta of this case, going as they do beyond the point ruled, would

Shisler v. Vandike.

indicate that no contract, vitiated by fraud of any kind, is the subject of subsequent ratification. But this cannot be sustained, as it is opposed to those decisions now regarded as law, notably, *Pearson v. Chapin*, 8 Wright, 9, and *Negley v. Lindsay*, 17 P. F. Smith, 217; s. c., 5 Am. Rep. 427. The distinction between these cases seems to be this, where the fraud is of such a character as to involve a crime, the ratification of the act from which it springs is opposed to public policy and hence cannot be permitted, but where the transaction is contrary only to good faith and fair dealing; where it affects individual interests, and nothing else, ratification is allowable. It is indeed conceded in the case last above cited, that if the original contract be illegal, or void for want of consideration no subsequent ratification will help it. If however the indorsement under the consideration was forged, it was not only void for want of authority, but it was also illegal, and so comes under the condemnation of all authority.

In *Garrett v. Gonter*, 6 Wright, 143, the question was, whether a mortgage, executed under the authority of a forged power of attorney, was the subject of ratification, and it was held that it was. But here there was no forgery of the mortgage itself, for it was executed under a supposed power. Mr. Justice STRONG, who delivered the opinion, says: "It is hardly accurate to speak of ratifying a forged instrument. It may be adopted, but adoption does not relate back and validate prior acts. If the letter of attorney was forged in 1854, no act of Mrs. Gonter in 1859, after her return from Europe, could make it efficient from its date. But she could confirm the mortgage, for that was executed in her name by a professed agent, acting under a real or pretended authority." Now, if we properly understand what is here said, it amounts to this, the mortgage, executed without a fraudulent intent, by a professed agent, under a supposed power, was susceptible of ratification, whilst on the other hand the forged letter of attorney was not susceptible of such ratification. This of course presupposes the innocence of both the agent and mortgagee, otherwise the mortgage itself would have been a fraud, and hence no more the subject of ratification than was the power. It is possible this case was strained in favor of the mortgagee, for it is very clear from the evidence, the verdict of the jury to the contrary notwithstanding, that the power of attorney was genuine. However be this as it may, this case does not conflict with that of *McHugh v. Schuylkill County*, and we must therefore con-

Shisler v. Vandike.

sider the latter as of binding authority. We conclude then that as from the evidence in the case in hand, the doctrine of ratification could have no place except as operative upon a forged instrument, it should have been wholly excluded, since being admitted, it amounted to the ratification of an illegal and criminal act. This sustains the fourth and fifth assignments of error.

Judgment reversed and a new *venire* awarded.

Judgment reversed.

NOTE BY THE REPORTER. — See *Workman v. Wright*, 38 Ohio St. 405; s. c., 31 Am. Rep. 546, and note, 549. In *Mackenzie v. British Linen Co.*, 6 App. Cas. 82, in the House of Lords, it was held, that continued silence on the part of a person whose signature has been written upon a bill of exchange by another, without authority, is not sufficient to preclude him from alleging the fictitious character of the signature, unless his conduct has prejudiced the position of the holder of the bill.

LORD BLACKBURN said, among other things: "I wish however to guard myself against being supposed to say that if a document with an unauthorized signature was uttered under such circumstances of intent to defraud that the uttering amounted to a forgery, the person whose name was forged could ratify it so as to make a defense for the forger against the criminal charge. I do not think he could do so; but by ratifying the act he makes himself civilly responsible to the same extent as if he had authorized it in the first instance, and it is immaterial whether he made the ratification to the person who seeks to avail himself of it, or to any one else." On the merits Lord WATSON said: "The question whether a forged bill has been adopted by the person whose signature has been forged is an issue of fact, and not of law; but the adoption of the bill may be a matter of legal inference from certain ascertained facts, and the inference which has been drawn adversely to the appellant appears to depend upon the fact, that after he became aware that a second forged bill had been discounted, he kept silence — or at least, did not inform the respondents of the forgery till nearly a fortnight had elapsed. The only reasonable rule which I can conceive to be applicable to such circumstances is that which was expressed in carefully chosen language by Lord WENSLEYDALE in *Freeman v. Cooke*. It would be a most unreasonable thing for a man who knew that bankers were relying on his forged signature to lie by and not divulge the fact until he saw that the position of the bank had been altered for the worse; but I think it would be equally contrary to justice to hold him responsible for the bill merely because he did not tell the bank of the forgery at once if he in fact gave the information, and if when he did so the bank were in no worse position than when it was first in his power to give the information."

In *Rudd v. Matthews*, Kentucky Court of Appeals, October, 1881, it was held that one whose name had been forged as surety on a note, and who admitted that the signature was genuine, and promised to pay the note, and thus induced the holder to forbear suit, until the maker became insolvent, was estopped from afterward setting up that his signature was forged. The court said: "In the case of *Casco Bank v. Keene*, 53 Me. 106, it was adjudged that one who adopts a signature knowing it to be forged, is estopped from denying its genuineness. In the case of *Heffren v. Dawson*, 63 Ill. 93, the proof showed that the surety by his admissions and declarations "the note was all right, and if the plaintiff would hold still he would pay him," authorized the conclusion that the surety designedly induced the plaintiff to omit to take measures to collect the same from the other maker when he was solvent. In the case of *Forsythe v. Bonta*, 5 Bush, 547, this court went so far as to say that a mere ratification of an unauthorized signing of a party's name to a note as joint obligor works an estoppel. While the mere ratification of a void contract may be regarded as without any consideration, and the soundness of the rule laid down in *Barton v. Forsythe* properly questioned, still in the case before us, there is not only a ratification but an express admission that the signature to the note was that of the surety. Under our present statute, the authority to sign the name of one to a note as surety must be in writing, and

Smith v. Hestonville, Mantua and Fairmount Passenger Co. Railway.

in *Merley v. Ragan*, this court held that proof of a promise to pay by the surety, when the note was signed without authority, would lead to the same evil that the statute was intended to remedy, and therefore held the testimony incompetent, and the promise not obligatory. In that case, if the party had admitted his signature was his own, the question would have been entirely different."

**SMITH V. HESTONVILLE, MANTUA AND FAIRMOUNT PASSENGER
COMPANY RAILWAY.**

(92 Penn. St. 450.)

Negligence — infant — contributory negligence of parent.

A mother allowed her child, seven years old, to serve the drivers and conductors of a street railway with water upon the cars, for a small compensation. While so employed the child was injured by the alleged negligence of the company. *Held*, that the mother was guilty of such contributory negligence as barred her recovery.

ACTION of damages for death of child by negligence. The opinion states the case. The defendant had judgment below.

A. Sidney Biddle, for plaintiff in error.

Samuel Gustine Thompson, for defendant in error.

TRUNKEY, J. Previous to the accident which caused the death of the plaintiff's son, he and older boys had been in the habit of supplying with water to drink, the drivers and conductors, who encouraged them to do this by giving them pennies. At the time, the plaintiff's child was at the defendant's cars for that purpose. The plaintiff not only had knowledge of this habit, which began before the summer vacation of the public school and was continued in the vacation, but she permitted it. She saw the money her child made, furnished him with cup and pitcher, and cautioned him to be careful in getting on and off the cars.

The child was not seven years of age. He was incapable of negligence, and could not use the care required of a mature person under like circumstances. His business was with the defendant's employees—to give them water and receive a reward. This is not the case of a child having occasion to cross the track in going to school, or for other purpose; nor of one that had wandered into

Smith v. Hestonville, Mantua and Fairmount Passenger Co. Railway.

the street without the parent's knowledge; nor even of one permitted to play on the street. If it be that the plaintiff's testimony warrants an inference of negligence by the defendants, because their drivers and conductors encouraged this child with others to furnish them water, the admitted fact that the child's act was with the plaintiff's permission, authorized the judgment of nonsuit, for the reason given by the learned judge of the Common Pleas.

The argument of counsel certainly is ingenious in support of his proposition, that "the negligence of the statutory plaintiff, arising from knowledge or direct act, cannot preclude recovery where there has been no contributory negligence on the part of deceased." However this is not an open question. In *Smith v. O'Connor*, 12 Wright, 218, it was held, that it is not unjust to require a defendant to answer for the mischief done by his wrongful conduct, in favor of one who was not in concurrent fault; and that an infant seven years old could not be in such fault. This was in reference to an action by the infant himself, and respecting an action by a father for an injury to his infant son, STRONG, J., said: "In such a case, it may be that the father should be treated as a concurrent wrong-doer. The evidence may reveal him such. His own fault may have contributed as much to the injury of the child, and consequently to the loss of services due him, as did the fault of the defendant. He owes to the child protection. It is his duty to shield it from danger, and his duty is the greater, the more helpless and indiscreet the child is. If by his own carelessness, his neglect of the duty of protection, he contributes to his own loss of the child's services, he may be said to be in *pari delicto* with a negligent defendant." These remarks were pertinent to the point decided in *Glassey v. Railroad Co.*, 7 P. F. Smith, 172, that a father cannot recover for an injury to his infant son, which was partly caused by his own imprudent act in failure to perform his paternal duty; and it makes no difference whether the injury of which he complains, was to his absolute or relative rights. Referring to that case, the present chief justice said, it very properly settled, "that if the parents permit a child of tender years to run at large without a protector, in a city traversed constantly by cars and other vehicles, they fail in the performance of their duties, and are guilty of such negligence as precludes them from a recovery of damages for any injury resulting therefrom. If the case is barely such, the negligence is a conclusion of law, and ought not to be

Thirteenth and Fifteenth Street Passenger Railway Co. v. Boudron.

submitted to the determination of the jury." *Railway Co. v. Pearson*, 22 P. F. Smith, 169. The principle was repeated in *Railroad Co. v. Long*, 25 id. 257, where it was said: "To suffer a child to wander on the street has the sense of permit. If such permission or sufferance exist, it is negligence."

Most frequently, in trials, the question whether there was reasonable care on the part of the parent is a fact for the jury; but where the testimony of the plaintiff directly shows his contributory negligence, it is the duty of the court to pronounce the law.

Judgment affirmed.

**THIRTEENTH AND FIFTEENTH STREET PASSENGER RAILWAY
COMPANY V. BOUDROU.**

(92 Penn. St. 473.)

Negligence — contributory — riding on platform of street car.

A passenger riding on the rear platform of a crowded street car leaned his back against the dasher, and was struck and injured by the pole of a following car. *Held*, that he was not negligent. (See note, p. 710.)

ACTION of damages for personal injury by negligence. The plaintiff got upon the rear platform of a crowded street car, and stood there with other passengers, leaning his back against the dasher. The car stopped, and the pole of another car, following rapidly, struck him in the back. The plaintiff had judgment below.

R. P. White, William Rotch Wister, and George W. Thorn, for plaintiff in error.

John Scollay and F. Carroll Brewster, for defendant in error.

TRUNKEY, J. The chief debatable question is presented in the sixth, seventh, eighth and tenth specifications of error. Defendant claims that the plaintiff was guilty of negligence which contributed to the accident, and that this was a question for the jury. The rule cited by its counsel is correct, namely, that to render a railway company liable to a passenger, the company shall be guilty of some

Thirteenth and Fifteenth Street Passenger Railway Co. v. Boudrou.

negligence or omission which mediate or immediately produced or enhanced the injury; and the passenger shall not have been guilty of any want of ordinary care and prudence, which directly or indirectly contributed to the injury; since no one can recover for an injury of which his own negligence was in whole or in part the proximate cause. 2 Redf. on Railw., § 193. This rule permits recovery where the passenger was negligent, if there was no causal connection between his negligence and the injury. Hence it is said in the same section, "Although the plaintiff's misconduct may have contributed remotely to the injury, if the defendant's misconduct was the immediate cause of it, and with the exercise of prudence he might have prevented it, he is not excused." And in Whart. on Neg., § 303, the principle is thus stated, "In order to defeat recovery of damages arising from defendant's negligence, the plaintiff's negligence must have been the proximate and not the remote cause of the injury; in other words, must be its juridical cause, and not merely one of its conditions." The author further says, § 324, "The negligence, to make it a juridical cause, must be such, that by the usual course of events it would result, unless independent moral agencies intervene, in the particular injury. * * *

In other words, to put the same doctrine into the language made familiar to us by the adoption of the terms 'proximate' and 'remote,' my 'remote' negligence will not protect a person who by 'proximate' negligence does me any injury." In England, the general rule is, that the plaintiff, in an action for negligence, cannot succeed if he has himself been guilty of any negligence or want of ordinary care which contributed to the accident. And a well-established qualification of the rule is, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him. *Radley v. Railway Co.*, L. R., 1 App. Cas. 754 (1876). Here perhaps the rule is not qualified to so great an extent; yet it is clear that a plaintiff may recover though he did not use due care, if his negligence in nowise caused the accident resulting in his injury. Indeed, the principle stated by Wharton, *supra*, seems to have been adopted in *Creed v. Pennsylvania Railroad Co.*, 5 Norris, 139, where GORDON, J., said, "The test for contributory negligence is found in the affirmative of the question, does that negligence

Thirteenth and Fifteenth Street Passenger Railway Co. v. Boudrou.

contribute in any degree to the production of the injury complained of? If it does, there can be no recovery; if it does not, it is not to be considered." The defendant's second point was, that upon the facts as therein stated, the plaintiff was guilty of negligence; and the fourth was, that the platforms of a passenger railway car are for ingress and egress, and it is negligence in a passenger to use them for any other purpose; and if the plaintiff occupied the back platform of the car on which he received his injury, for the purpose of being carried as a passenger, he was guilty of contributory negligence. Such were the instructions prayed, yet the defendant now urges, that "under the testimony, the question whether Mr. Boudrou's position on the rear platform contributed to his injury, was one for the jury." In truth, there was no controversy as to the circumstances of the accident, there was but one way to find the facts, if the jury regarded the testimony; and at the trial the defendant demanded that the court should say there was concurrent negligence, if certain facts were found. The learned judge, taking a different and correct view, very properly charged that the plaintiff could not recover if the injury resulted from any negligence on his part; that if the jury should find that the plaintiff was negligent in standing on the rear platform, and yet find that the collision could not have happened but for the negligence of the driver of car 14, plaintiff's negligence was remote and not a bar to his recovery. His reasons given, as leading to that conclusion, are unanswerable. The large number of passengers in this city, who voluntarily stand on the platforms, because there is neither sitting nor standing room in the cars, do not, and ought not, anticipate that they will be run over by following cars. Their position has no tendency to induce the driving of one car into another. Whatever the degree of their negligence in riding on the platform, and the risks they take in so doing, every one knows that so long as he remains there, he is in no danger of being run down by a car, unless from its heedless handling. When the plaintiff was struck, his post was a condition, but not a cause of his injury. It neither lessened the speed of the car he was on nor increased that of the other; his presence was not a cause of the broken chain and reckless driving of car 14; his place was an incident of an overcrowded car, whose conductor had left the platform to give him standing room, and had not pointed him to a seat or requested him to enter the car. We are not persuaded that differ-

 Thirteenth and Fifteenth Street Passenger Railway Co. v. Boudrou.

ent minds could honestly draw different conclusions from the facts, but on the contrary are convinced the court was right in refusing the second and fourth points, and in the instructions set out in the sixth assignment.

As a general rule it cannot be doubted the question of negligence is one of fact and not of law ; and the case must be very clear which will justify the court in refusing its submission to the jury. *Detroit & Michigan Railroad v. Steenberg*, 17 Mich. 99; *Mayo v. Boston & Maine Railroad*, 104 Mass. 137. But it has been repeatedly held that certain facts, when established, amount to negligence *per se*. *Hoag v. Lake Shore & M. S. Railroad Co.*, 4 Norris, 293. And when the evidence is insufficient to warrant a finding of negligence, it is the duty of the court to order a nonsuit, or refuse to submit the question, as the case may require. And nonsuit will be ordered if the plaintiff's testimony clearly shows his contributory fault. In some cases negligence is an inference of law from the facts proved. *Empire Transportation Co. v. Wamsutta Oil Co.*, 13 P. F. Smith, 14; s. c., 3 Am. Rep. 515. In others, there may not be evidence of the defendant's negligence, and if that be proved, it may be clear that there is no testimony of the plaintiff's showing concurrent negligence. It is error to submit a question to the jury of which there is no evidence. *Jones v. Wood*, 4 Harris, 25; *Evans v. Mengel*, 6 Watts, 72; 1 Barr. 68.

[Omitting a statutory consideration.]

Judgment affirmed.

SHARSWOOD, C. J., and PAXSON, J., dissented.

NOTE BY THE REPORTER. — In *Wills v. Lynn & Boston Railroad Co.*, 129 Mass. 251, it was held that a passenger injured while sitting on the front platform of a street car, in spite of the rule of the company and the warning of the driver, has no remedy against the company. The court said, in substance: Plaintiff's intestate, a passenger on defendant's street railroad car, when the car was approaching a draw-bridge, sat down on the front platform. He was told by the driver of the car that he had better not sit in that place, as it was against the rules of the defendant and unsafe, to which he made a reply not understood by the driver. He continued to occupy his position while the car was detained at the bridge some fifteen minutes by an open draw; and remained there until he fell from the car after it had passed the bridge, receiving the injuries whereof he died. There were notices posted upon the car forbidding passengers to be upon the platform and that the defendant would not be responsible for the safety of passengers while there. In an action for such injuries, held, that the defendant was not liable. It was for the plaintiff to prove that the intestate was free from negligence contributing to the injury which he received. Plaintiff could recover if the case presented failed to disclose the exercise on his part of ordinary care, as judged of in the light of common knowledge and experience. The rule is to be applied which requires the exercise of such care as men of common prudence usually exercise in positions of like exposure and danger. The que-

Thirteenth and Fifteenth Street Passenger Railway Co. v. Boudrou.

tion is in most cases a question to be submitted to the jury, but when the circumstances are not complicated, and the undisputed evidence discloses conduct which would be condemned as careless by men of common prudence, it is the duty of the judge to instruct the jury to find a verdict for the defendant. *Garrett v. Manchester & Lawrence R. Co.*, 16 Gray, 501; *Gahagan v. Boston & Lowell R. Co.*, 1 Allen, 187; *Todd v. Old Colony R. Co.*, 7 id. 207; *Hickey v. Boston R. Co.*, 14 id. 429; *Baltimore City Pass. Ry. Co. v. Wilkinson*, 30 Md. 224. The evidence in this case wholly failed to show that intestate was in the exercise of due care. He was a passenger occupying an exposed and unusual place in a constrained and awkward position, against the rules of the road and the warning of the driver. The case differs from *Meesel v. Lynn & Boston R. Co.*, 8 Allen, 234. There the plaintiff had paid his fare, and was told by the conductor to go on the front platform with several others, and he was thrown off while the car was turning a corner with unusual speed, and he was holding on to an iron railing. A street railway corporation has a right to make all reasonable regulations for the safety of passengers. A rule prohibiting passengers from riding on the front platform is a reasonable regulation; and one who knowingly violates it, without some reasonable excuse or necessity, cannot be said to be free from negligence, if the act contributes to his injury. *

In *Downie v. Hendrie*, Michigan Supreme Court, October, 1881, a street car passenger was invited by the driver to sit on the driving bar, though there was room inside, and on a sudden jerk fell off and was run over. He sued the carrier for the injury. *Held*, that as he was perfectly able to take care of himself and as there was opportunity for him to take a safe seat, he was guilty of contributory negligence, and that the driver's invitation did not estop the carrier from relying on such negligence in defense.

In *Germantown Passenger Ry. Co. v. Walling*, Pennsylvania Supreme Court, Jan., 1881, it was *held* that riding on the front platform of a street car which is crowded is not contributory negligence *per se*, precluding a recovery for the death of a passenger occurring while so riding. The facts were these: Deceased took passage in one of defendant's street cars; when the car stopped for him he tried to get on the rear platform, but could not do so on account of the crowd thereon. He then went to the front platform and found a place upon the step which he took and kept by holding with one hand on to the iron of the dasher and with the other hand to an iron bar under the front window of the car. While the car was going round a corner some little time after deceased had commenced to ride, several passengers were thrown against him, forcing him to let go his hold on the iron bar under the window, and causing him to fall over in front of the car, in consequence of which he was run over and killed.

The court said: "Conductor, driver and passengers acted as if there was room, so long as a man could find a rest for his feet and a place to hold on with his hands. Nor was that action exceptional. Notoriously it was very common in 1876, and perhaps it is not infrequent at this day. The companies do not consider such practice dangerous, for they knowingly suffer it and are parties to it. Their cars stop for passengers when none but experienced conductors could see a footing inside or out. The risk in travelling at the rate of six miles an hour is not that when the rate is sixty or even thirty. An act which would strike all minds as gross carelessness in a passenger on a train drawn by steam-power, might be prudent if done on a horse-car. Rules prescribed for observance of passengers on steam railroads, which run their trains at great speed, are very different from those on street railways. In absence of express rules every passenger knows that what might be consistent with safety on one would be extremely hazardous on the other.

"Street railway companies have all along considered their platforms a place of safety, and so have the public. Shall the court say that riding on a platform is so dangerous that one who pays for his standing there can recover nothing for an injury arising from the company's default?

"*Meesel v. Lynn & Boston R. Co.*, 8 Allen, 234, was a case much like this in its facts. The court said. 'It is well known that the highest speed of a horse-railroad car is very moderate and the driver easily controls it and stops the car by means of his voice, his reins, and his brake. In turning round an angle from one street to another passengers are not required to expect that he will drive at a rapid rate, but on the contrary might reasonably expect a careful driver to slacken his speed. The seats inside are not the only places where the managers expect passengers to remain; but it is notorious that they stop habit-

Thirteenth and Fifteenth Street Passenger Railway Co. v. Boudrou.

ually to receive passengers to stand inside till the car is full, and then to stand on the platforms till they are full, and continue to stop and receive them after there is no place to stand except on the steps of the platforms. Neither the officers of these corporations nor the managers of the cars nor the travelling public seem to regard this practice as hazardous; nor does experience thus far seem to require that it should be restrained on account of its danger. There is therefore no basis upon which the court can decide upon the evidence reported that the plaintiff did not use ordinary care. It was a proper case to be submitted to the jury upon the special circumstances which appeared in evidence. These remarks are quite applicable to the case in hand.

"Standing on the front platform of a horse-car when there is room inside is not conclusive evidence that the person injured by the driver's default was not exercising due care. *Maguire v. Middlesex R. Co.*, 115 Mass. 289. A street railway company has the right to carry passengers on the platforms, and if a passenger be injured while standing there without objection by the company's agent, whether the injury was with his contributory negligence is for the jury to decide under all the facts and circumstances detailed in evidence. *Burns v. Bellefontaine & St. L. R. Co.*, 50 Mo. 189.

"It has also been decided in other States that if a passenger be injured while standing on the platform of a street or horse-car the question of his contributory negligence is one of fact for the jury.

"So little danger exists in riding on the platforms, accidents to passengers while thus riding are so rare, that this is the first time the question raised has been presented in Pennsylvania. We think the decisions in other States above referred to are sound. They accord with well-settled principles. What is and what is not negligence in a particular case is generally a question for the jury and not for the court. It is always a question for the jury when the measure of duty is ordinary and reasonable care. When the standard shifts with the circumstances of the case, it is in its very nature incapable of being determined as a matter of law. When both the duty and the measure of its performance are to be ascertained as facts, a jury alone can determine what is negligence and whether it has been proven. *West Chester & Philadelphia R. Co. v. McElwee*, 17 P. F. S. 311.

"It is the duty of courts in cases of clear negligence arising from an obvious disregard of duty and safety to determine it as a question of law. This principle was applied in the numerous cases cited by defendant. It should always be, when the admitted facts or the proofs adduced by a party conclusively show his negligence.

"The undisputed facts in this case show that the measure of duty on the part of the deceased was ordinary and reasonable care, and what that was and whether he complied with it could only be determined by the jury."

Passengers standing on the platform of street cars are guilty of negligence when there is room inside. *Clark v. Eighth Avenue R. Co.*, 82 Barb. 657; s. c., 36 N. Y. 126; *Solomon v. Central Park R. Co.*, 1 Sweeney, 298; *Maguire v. Middlesex R. Co.*, 115 Mass. 289; *Ginna v. Second Avenue*, 67 N. Y. 596. But the presumption of negligence is rebutted on showing that the car is full and no room inside, and that the conductor received the fare from the passenger. *Clark v. Eighth Avenue R. Co.*, 36 N. Y. 126, and cases, *supra*. Also, *Augusta, etc., R. Co. v. Renz*, 55 Ga. 126; *Meesel v. Lynn, etc., R. Co.*, 8 Allen, 294; *Huelsenkamp v. Citizens' R. Co.*, 37 Mo. 537; s. c., 34 id. 45. And standing on the front platform, even when there is room inside, does not constitute *per se* negligence, when the injury is incurred by the fault of the company's servant. *Burns v. Bellefontaine R. Co.*, 50 Mo. 189; *Maguire v. Middlesex R. Co.*, *supra*. So where one is compelled to ride on the platform of a car by a conductor, being ordered to give up his seat inside, the company was held liable for an injury incurred by careless driving (*Sheridan v. Brooklyn, etc., R. Co.*, 36 N. Y. 89), or was induced to ride there by the invitation of the conductor without pay. *Wilton v. Middlesex R. Co.*, 107 Mass. 108; s. c., 9 Am. Rep. 11, *contra*, *Baltimore, etc., R. Co. v. Wilkinson*, 30 Md. 224.

But standing in an unsafe position upon the platform of a car after an opportunity is afforded the passenger of exchanging it for a safer one is contributory negligence (*Ward v. Central Park, etc., R. Co.*, 11 Abb. (U. S.) 411, s. c., 42 How. Pr. 289), though it is not negligence *per se* to omit to take hold of the railing to prevent being thrown off. *Ginna v. Second Avenue*, *supra*.

It is usually a question of fact for the jury whether those in charge of a car are negligent

Thirteenth and Fifteenth Street Passenger Railway Co v. Boudron.

in allowing a passenger to stand upon or get on or off the front platform, and in not sooner stopping the car *Thomp. Car. of Pass.* 445, *Orissey v. Hestonville, etc.*, *R. Co.*, 75 Penn. St. 83 *Maier v. Central Packet R. Co.*, 67 N. Y. 52; affirming s. c., *Jones & S.* 155. And where plaintiff, a child of five years, with another of eleven years, got on the front platform of a street car and the driver allowed them to continue in that position, and in attempting against the remonstrance of the driver to get off while the car was in motion the plaintiff was hurt, it was held negligence as matter of law in the driver to allow children so young to ride on the platform, and that the company was liable. *Caldwell v. Pittsburgh, etc.*, *R. Co.*, 74 Penn. St. 421; *Brennan v. Fairhaven, etc.*, *R. Co.*, 45 Conn. 284; *Philadelphia, etc.*, *R. Co. v. Hassard*, 75 Penn. St. 367; *East Saginaw Cit. R. Co. v. Boker*, 27 Mich. 503, *Wilton v. Middlesex R. Co.*, 107 Mass. 103; s. c., 9 Am. Rep. 11; s. c., 125 Mass. 190; *Day v. Brooklyn, etc.*, *R. Co.* 12 Hun, 435 See also *Commonwealth v. Boston & Maine Railroad, ante.* and note, 384; and 24 Alb. Law Jour., 365, "Street Railways."

In *Nolan v. Brooklyn City and Newtown R. Co.*, New York Court of Appeals, Nov., 1881, the plaintiff, a passenger on a street car, rode on the front platform, without warning or notice to the contrary, for the purpose of smoking. There was plenty of room inside, but the conductor took his fare without comment. Being thrown off and injured by a violent and negligent jolt, *held*, that he was not debarred from recovery by his occupying the platform.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

EDGAR V. CASTELLO.

(14 S. C. 20.)

Action — parent and child — damages for death of minor child.

A father at common law cannot recover damages for the immediate death of his child produced by the negligence of a third person. (*See note, p. 716.*)

ACTION of damages for death of minor child by negligence of a third person. The opinion states the case. The defendant had judgment below.

A. J. McGrath, Jr., for appellant.

De Saussure & Son, contra.

McIVER, A. J. [Omitting a statutory consideration.] But aside from our statute upon the subject, we think the motion for a nonsuit was properly granted. As was said by Mr. Justice HUNT, in *Insurance Company v. Brame*, 95 U. S. 757, quoting from HILLIARD on Torts, the rule undoubtedly is “that at common law, the death of a human being, though clearly involving pecuniary loss is not the ground of an action for damages.” There are some cases (*Plummer v. Webb*, 1 Ware 80; *Ford v. Munroe*, 20 Wend. 210),

Edgar v. Castello.

which might be claimed as establishing, as an exception to this rule, the right of the father, in his character of master, to bring an action for an injury causing the death of his child; but the ground of such action, if sustainable at all, is the loss of the services of the child as a servant. This is manifest from the case of *Plummer v. Webb*, which though recognizing the rights of the father, as master, to bring an action against another who has wrongfully caused the death of his child, places that right exclusively upon the ground of the loss of services, for there, the child having been hired to a third person, it was held that the father could not recover because the services of the child were due, not to the father, but to such third person, and hence that the action in that case could not be maintained by the father. So also *Ford v. Munroe*, was an action brought by a father to recover damages sustained by reason of the killing of his child, about ten years of age. The special damage alleged was: 1. That the plaintiff's wife was made sick by reason of the occurrence, and that he was thereby deprived of her society and was subjected to expense in procuring necessary attendance upon her. 2. The loss of the services of the child from the time the injury was sustained until he would have attained his majority. The jury were charged that the plaintiff might recover whatever sum the jury might think the services of the child would have been worth from the time the injury was sustained until he attained the age of twenty-one years, and also for damages incident to the wife's sickness. These points of the charge received but little attention at the hands of the court, though they were sustained, the principal question considered being in relation to another matter. It is difficult to understand how in any view of the case, that portion of the charge which permitted the jury to give, as damages, whatever they might think the services of the child would have been worth from the time of the injury until he attained the age of twenty-one years, could be vindicated, for the child might have died from natural causes long before he reached the age of twenty-one years.

It is said however by Mr. Justice HUNT, in the case of *Insurance Co. v. Brame, supra*, in speaking of these cases: "They are considered by the New York Court of Appeals, in *Green v. Hudson River Railroad Co.*, 2 Keyes, 294, and compared with the many cases to the contrary, and are held not to diminish the force of the rule above stated."

Edgar v. Castello.

The case of *Cutting v. Seabury*, 1 Sprague Dec. 522, which has been cited to sustain the doctrine that a father may recover damages for an injury to his child resulting in death, does not decide any such proposition, but on the contrary, Mr. Justice SPRAGUE, though expressing his own opinion in favor of such a doctrine, admits that "the weight of authority in the common-law courts seems to be against the action, but natural equity and the general principles of law are in favor of it," and then undertakes to show, that by the civil law, such an action could be maintained. Indeed, we do not find that it is anywhere decided that the father could maintain such an action except where it is alleged and proved that the father has sustained damage by reason of the loss of services of the child, or by reason of expenses incurred from the killing of his child for funeral or other expenses. Hence where as in this case, there is no allegation in the complaint upon which such damages could be claimed, we do not see how, in any view of the question, this action could be maintained. And where, as in this case, death resulted immediately from the injury, and the child was of such tender years as to negative the idea that he could render any such service to the father, there certainly could be no ground for a claim of damages from a loss of services; and as to the funeral expenses, in addition to the fact that there is no allegation upon which to base a claim for such damages, we find that it has been distinctly decided in the recent case of *Osborn v. Gillett*, L. R., 8 Exch. 88, that a father could not maintain an action for injuries which caused the immediate death of his child, either upon the ground of loss of services or for burial expenses.

[Omitting a minor consideration.]

We are of the opinion, that in any view which may be taken of this case, the judgment of the Circuit Court was right, and accordingly is affirmed.

Judgment affirmed.

WILLARD, C. J., and MCGOWAN, A. J., concurred.

NOTE BY THE REPORTER. — In *Osborn v. Gillett*, L. R., 8 Exch. 88, a case of the negligent killing of the plaintiff's daughter and servant, BRAMWELL, B., dissented in a strong opinion, in which he said, among other things: "This action is no more against good policy than one would be where the servant was crippled, but not killed." He argues that the maxim, *actio personalis moritur cum persona*, refers to "the person who was to be the party to the action as plaintiff or defendant," and supposes an action "once alive, but here the argument is, that the plaintiff never had any action." He concludes: "The principle is

Edgar v. Castello.

plaintiff relies on is broad, plain and clear, viz.: 'That he sustained a damage from a wrongful action, for which the defendant is responsible.' He doubts and puts aside *Baker v. Bolton*, and distinguishes *Higgins v. Butcher* on the ground that no pecuniary damage was shown. He reviews the cases of *Skinner v. Housatonic R. Co.*, 1 Cush. 475; *Carey v. Berkshire R. Co.*, id., and *Eden v. Lexington & Frankfort R. Co.*, 14 B. Monr. 204, and explains them on the ground that they are founded on *Baker v. Bolton*, "and some vague notion of merger in a felony."

His review of these authorities is as follows: "The remaining authorities are American, not binding on us indeed, but entitled to respect as the opinions of professors of English law, and entitled to respect according to the position of those professors and the reasons they give for their opinions. The first case in date is in 1 Cush. 475, a case in the Supreme Court of Massachusetts. In one of the cases there reported (*Skinner v. Housatonic Ry. Corp.*), an action was brought by a father to recover damages for the loss of his son's service, killed by the negligence of the defendants by an act not felonious. In the other case (*Carey and Wife v. Berkshire Ry. Co.*), an action was brought by a widow to recover damages for the death of her husband, killed in like way. It seems strange that the two cases are supposed to present a single question only for the court, while it is obvious that the case of master and servant raises a different question from that of wife and husband. Nor do I understand why the plaintiff in the father's case, unless there was no damage to the father as master, was nonsuited. That looks as though he had not proved some fact, possibly he had not proved damage, for the child was eleven years old only, and it is nowhere said there was any damage. If so, the decision is right. But the judgment is, 'If these actions, or either of them, can be maintained, it must be on some established principle of the common law.' Now, that is true, and the principle is *injuria* and *damnum*, for which the defendant is responsible. The judgment proceeds, 'and we might expect to find that principle applied in some adjudged case in the English books, as occasions for its application must have arisen in many instances. At least, we might expect to find the principle stated in some elementary treatise of approved authority. None such was cited by counsel and we cannot find any. This is very strong evidence that such actions cannot be supported.' With great respect, the error of this reasoning is in supposing the burden of proof or argument is on the plaintiff. The general principle is in his favor, that *injuria* and *damnum* give a cause of action. It is for the defendant to show an exception to this rule where the *injuria* causes death. If the case had been viewed in this way, the reasons of the court tell for the plaintiff. For in my judgment the exception is not upon any established principle of the common law; it is not applied in any adjudged case in the English books. it is not stated in any elementary treatise. They there cited and relied on *Baker v. Bolton*, 1 Camp. 498, on which I have commented. They then cite a case in which the contrary was assumed to be the law by all parties and the court, but suppose it may have passed *sub silentio*. I cannot be satisfied with this decision. The reasoning seems wrong and the authority relied on insufficient.

"The other case, *Eden v. Lexington and Frankfort R. Co.*, 14 B. Monr. 204, is in the Kentucky Court of Appeal. This was an action by a husband for the negligent killing of his wife. It is obviously therefore not in point. There is no relation of master and servant. If the wife had lived, she must have joined in the action, except to the extent of the husband's pecuniary loss for medicine, etc. But in the judgment the case of master and servant is mentioned. I do not very clearly understand it. The first position was, that the rule that no action lies for a felonious act before prosecution does not prevail in Kentucky. The second is this: "But according to the principles of the common law, injuries affecting life cannot in general be the subject of a civil action. In other inferior felonies the civil remedy is merely suspended until after the conviction or acquittal of the supposed felon. But for injury to life the civil remedy is considered as being entirely merged in the public office." This was said to be the established common-law doctrine in the case of *Baker v. Bolton*. It is true Lord ELLENBOROUGH is reported to have said that in a civil court death could not be complained of as an injury. But there is nothing else to justify the above opinion, and if this is the authority, *White v. Spettigue*, 13 M. & W. 608, shows its inapplicability here. The judgment proceeds: 'The cause of action for injuries to the person dies with the person injured, and it follows as a necessary consequence, that the cause of action having itself abated, no separate action can be maintained for such damages as

Edgar v. Castello.

are exclusively consequential.' I have dealt with this argument before. It is this: 'Wrongful death which causes a damage gives no action because it is death which causes it.' The judgment proceeds to say, 'that damages may be recovered up to the time of death, but not beyond.' The reason of this seems to be that all injuries affecting life caused by the misconduct of another person involve the commission of a public wrong, which merges the remedy for all private loss arising after death has occurred and occasioned by it. Why every death caused by misconduct is to be assumed to be a public wrong I know not. The misconduct may be actionable, though not criminal negligence. Nor do I know why, however this may be, the remedy for private loss should merge in it." The learned Baron makes no reference to *Green v. Hudson R. R. Co.*, 2 Keyes, 294. He says, "With the exception of a short note of the case of *Baker v. Bolton*, 1 Campb 498, there is no semblance of an authority on this side of the Atlantic," against recovery in such a case. On the other hand, PIGOTT, B., said: "It is admitted that no case can be found in the books where such an action as the present has been maintained;" and KELLY, C.B., said: "No decision is to be found in the books from the earliest times by which an action for this cause has been sustained. No dictum is to be found by any judge or upon any competent authority that such an action is maintainable. All the authority that exists is against it."

This topic is exhaustively annotated by Judge THOMPSON (2 Neg. 1872). He cites, as sustaining the doctrine of the principal case, among other authorities, the following additional to those above noted: *Indianapolis, etc., R. Co. v. Davis*, 10 Ind. 398; *Telfer v. Northern R. Co.*, 80 N. J. 188; *Kramer v. San Francisco R. Co.*, 25 Cal. 424; *Conn., etc., Ins. Co. v. N. Y., etc., R. Co.*, 25 Conn. 265; *Hyatt v. Adams*, 16 Mich. 180; *Nickerson v. Harriman*, 38 Me. 277; *State v. Grand Trunk Ry. Co.*, 58 id. 176; s. c., 4 Am. Rep. 258; *Wyatt v. Williams*, 43 N. H. 102; *Smith v. Sykes*, Freem. 264; *Donaldson v. Miss., etc., R. Co.*, 18 Iowa, 280; *White v. Maxey*, 64 Mo. 552; *Woodard v. Mich., etc., R. Co.*, 10 Ohio St. 121; *Selma, etc., R. Co. v. Lacey*, 49 Ga. 106; *Needham v. Grand Trunk Ry. Co.*, 38 Vt. 294; *O'Donoghue v. Akin*, 2 Duv. 478. (To same effect is *Covington St. Ry. Co. v. Packer*, 9 Bush. 455; s. c., 15 Am. Rep. 725, a case of parent and child.) On the other hand he cites an able opinion by DILLON, J., in *Sullivan v. Union Pac. R. Co.*, 3 Dill. 334.

The earliest case in this country is *Cross v. Guthery*, 2 Root, 90; s. c., 1 Am. Dec. 61, where damages were allowed a husband for malpractice of a surgeon upon his wife, resulting in her death in three hours. No expressed consideration was given. The earliest case in England is *Higgins v. Butcher*, A. D. 1607, Yelv. 89, holding that no damages are recoverable by a husband for an assault and battery upon his wife causing her death. This is put on the ground of the consequent felony, "that drowns the particular offense and private wrong." The next case was *Baker v. Bolton*, decided by Lord ELLENBOROUGH, in 1808, 1 Camp. 498, where the same doctrine was held as to a case of negligence. Judge THOMPSON says that the doctrine of the latter case has been generally adopted in this country. Its injustice was insisted on, *obiter*, while the rule was enforced, by SPRAGUE, J., in *Crittig v. Seabury*, Sprague Dec 522, and the same idea was advocated, *obiter*, in *Pharmar v. Webb*, 1 Ware, 75. An early case in Georgia, *Shields v. Yonge*, 15 Ga. 349 decides the same doctrine on the ground that the doctrine of merger in felony has no application to actions for negligence. The question was not controverted in *Ford v. Monroe*, 20 Wend. 210, but the right to recover was assumed. The court, while enforcing the exception in *Hyatt v. Adams*, *supra*, were "at a loss to discover its reason or philosophy."

The New York Court of Appeals, in the late case of *McGovern v. N. Y. Cent., etc., R. Co.*, 67 N. Y. 417, recognize *Ford v. Monroe*, *supra*, as a binding authority. They held that in an action, under the statute, by a father, as administrator, for the negligent killing of his minor son, where the whole recovery is for his exclusive benefit, he may recover his whole damages, not only as his next of kin but as father, including the loss of the son's services during minority. The court say: "Assuming, as seems to have been held in *Ford v. Monroe*, 20 Wend. 210, that a father can recover damages for the loss of service of his minor son against a person who negligently caused his death, to be computed and ascertained from the time of his death until the time when the son, if living, would have attained his majority, the question arises whether, in an action brought by the father, as administrator, under the statute, the entire damages may be recovered including the loss of service when as in this case the father elects to proceed for and claim his whole damages in the statutory

Edgar v. Castello.

action, and the recovery is for his exclusive benefit. We are inclined to the opinion that in such a case damages for the loss of service may be included in the recovery as a part of the pecuniary loss to the next of kin of the deceased, resulting from his death, and that a recovery will bar another action for the same damages by the father as such. The point is certainly not free from difficulty, but this construction of the statute is, we think, permissible, and it is convenient, avoiding as it does the necessity which would otherwise exist of splitting up what is substantially a single claim, and bringing two actions for its recovery. We confine our opinion to the precise case presented, assuming, on the authority of *Ford v. Monroe*, that the father has a right of action, independent of the statute, for loss of service." Here is no mention of *Green v. Hudson River R. Co.*, *supra*, which was decided upon the same statute, but which, to be sure, was a case of husband and wife; and there seems to have been no intention of overruling it, as indeed that case did not profess to overrule *Ford v. Monroe*. But what just distinction can be drawn between the two relations? Both actions proceed on the theory of loss of service.

Although Baron BRAMWELL makes a distinction between the case of husband and wife and that of master and servant, yet his reasoning would apply to the latter as well as the former. On this subject Mr. Wood (*Mast. and Servt.*, § 223) speaks of this qualification of the general rule of recovery as "not predicated upon any well-defined principle," and as "quite vigorously and justly attacked by Mr. Reeves" (*Dom. Rel.* 537). He explains the reason of the exception, as "not so much because the civil remedy is merged in the felony, as because by the death of the servant the master's right to his services is instantly abrogated, and in the eye of the law no damage is sustained by him, because no right is infringed. The justice of this rule may not be quite apparent, but the law will not deal with mere speculations and uncertainties. It will not determine, nor attempt to determine, the measure of human life, except for the happening of an event which has destroyed it, nor presume that capacity to serve would have continued if the injury had not been inflicted. It stops at the outer limit of the master's rights under his contract, and as when the servant's death intervenes the master's right to his services are ended, so in like manner are all his remedies for injuries arising under the contract, except such as accrued prior to his death." Mr. Wood however quotes in full Judge DILLON's opinion in *Sullivan v. Union Pac. R. Co.*, *supra*, remarking, "it is the precursor of a doctrine more consistent with principle than that generally adopted, although it is proper to say that the courts will doubtless be slow in its adoption, but sooner or later it will be recognized as expressive of the true principle controlling such cases." Mr. Smith, in his work on Contracts, Baron BRAMWELL says, adopts the doctrine contended for by Baron BRAMWELL and Judge DILLON.

In *Wilson v. Bumstead*, Nebraska Supreme Court, Nov., 1881, it was remarked, *obiter*: "At common law, and independent of statutory provisions, an action for damages cannot be maintained for the death of a human being. There are a few cases decided in this country, notably that of *Sullivan v. Union Pacific R. R.*, 8 Dill. 385, where it is held that such an action can be maintained. But it is evident, from an examination of the cases, that such decisions are not derived from the common law. Judge COOLEY, in his work on Torts, page 14, says: 'In the vast majority of all the cases in which remedies are given for wrongs committed, the judge looks only to the common law, and must administer justice on principles which have grown up irrespective of statutes, and which, no matter how recently announced, are assumed to have existed from time immemorial.' Again, on page 15 of the same work, it is said: 'No action would lie at common law for causing the death of a human being. This was as thoroughly settled by decisions as it was possible for any point to be, and the concurrence of authority was unanimous.' "

PENDER V. LANCASTER.

(14 S. C. 25.)

Homestead exemption — marriage after levy.

The marriage of an execution debtor, after levy on personal property but before sale, does not entitle him to a homestead exemption.

ACTION of damages for wrongful levy. The opinion states the facts. The defendant had judgment below.

Robert Aldrich, for appellant.

I. M. Hutson, contra.

WILLARD, C. J. The defendant, the sheriff of Barnwell county, levied upon a horse belonging to the plaintiff, under an execution issued upon a judgment recovered against the defendant. Subsequent to the levy the plaintiff married and claimed to have become the head of a family, and thereby entitled to the right of a homestead, and demanded of the defendant, as sheriff, the horse so levied upon, as exempt from execution. The defendant refusing to recognize such right of exemption, the present action was commenced, which resulted, at the Circuit, in a judgment of nonsuit.

The only question presented by the appeal is, whether the fact that the plaintiff became the head of a family and entitled to a homestead right, as such, and to the exemptions of personal property incident thereto, after the levy, entitled him to allege such exemption as against personal property actually levied upon prior to the acquisition of such right of exemption.

The argument of the appellant places the right of homestead, and those exemptions of personal property connected therewith, on a peculiar footing, distinguishing them in important particulars from ordinary rights. The validity and effect of rights are usually tested by the state of things existing at the time they became operative. Conflicting claims in the nature of rights of property, general or special, take priority, as among themselves, according to the time when they commenced to act upon the particular subject of property. But the appellant regards the right of homestead and the concomitant right to exemptions of certain kinds of personal prop-

Pender v. Lancaster.

erty, as *sui generis*, and as operating independently of the fact of having priority in point of time over other rights conflicting with them. The respondent claims that by virtue of the levy the execution took a special property in the horse levied upon, which having become vested, could not be divested through a right of homestead exemption arising subsequently to the levy, while the appellant claims that the only test of the validity of the right of exemption is whether it existed at the time the property was demanded of the sheriff and at the time of sale.

The right of homestead exemption, and that to the exemption of personal property of the prescribed kinds, must be regarded as of the same nature and attended by the same general incidents, as they are both created by the same instrument for the accomplishment of the same purpose, and only differ in the respect that one relates to real and the other to personal property, which is unimportant in its bearing on the question of their nature. It will serve the purpose of convenience to discuss the question as one of homestead exemption, reserving for subsequent consideration the question whether the difference in the mode of asserting the right in the two cases gives rise to any distinction between them material to the present question.

The provisions of the Constitution granting the right of homestead exemption must be regarded as taking effect in one or the other of two modes, namely, either as creating in certain persons rights of a remedial character, capable of being enforced by action or defense, as the case may require, or by limiting the jurisdiction and powers of the courts so as to deny a certain efficacy to their process. According to the view last mentioned, the Constitution operates by way of disabling the process of the court from having any effect to deprive a person entitled to such exemption of the property to which such exemption relates. These provisions of the Constitution (art. II, § 32) declare that certain rights of property held by certain persons "shall be exempt from attachment, levy or sale, on any mesne or final process issued from any court." Was it the intention of the Constitution to deprive the process of the court of efficacy in certain cases by acting directly on such process? If so, then the levy of an execution upon property entitled to exemption is, *ipso facto*, void. Certainly it cannot be contended that the process of a court can take an effect denied to it by the Constitution, especially where, as is contended by the appel-

lants, the object of the Constitution was to act upon the process so as to prevent such an effect. Such being the case it would be unnecessary for the defendant in an execution, claiming property levied upon thereunder as exempt under the Constitution, to take any steps to prevent a sale, but he might content himself by standing by silently until that property has passed into the hands of a purchaser from the sheriff, and then, by an action against such purchaser, contest the constitutional efficacy of the levy. In such a case the requirements of the statute, under which the debtor must assert his right of exemption in a particular manner, while the property is in the hands of the sheriff, would be not only useless, but in derogation of the Constitution, as imposing conditions upon the right of exemption in excess of what is imposed by the Constitution creating such right, declaring the cases in which it may be exercised and the mode of its exercise. It would also follow, if this view could be maintained, that a sale for the foreclosure of a mortgage or other lien created by the debtor, other than for the purchase-money of the land, would be invalid, as the process by which such sale must be effected is within the description set forth in the Constitution, of the process from which such property is declared exempt. Another consequence that would result would be that when a judgment had once taken a lien upon land, that lien might be defeated by a subsequently arising right of homestead exemption, as the final process for enforcing it would be without capacity to operate against such a homestead right. That such consequences do not flow from the Constitution is evident, not only from the consideration of the principles of construction, but from the opposite conclusions reached by this court, in general harmony with the views that have prevailed wherever the system of homestead exemptions has been adopted.

On the other hand, the conclusion that the Constitution intended as its proper effect, the investing of the debtor with a right of exemption that must be asserted as other similar rights are required to be asserted, and which might be lost by neglect to assert it, or by estoppel arising from his acts, and which, when asserted, would carry with it the usual incidents of such rights, is clear on the face of the Constitution, and is in harmony with all the decisions under it. In that case the proper subjects upon which it must be regarded as intending effect are the rights of the judgment debtor and the duty of the officer or person using such process commensurate with

Pender v. Lancaster.

such right. This view leaves the debtor to prosecute his right of exemption by such proceedings and means as may be prescribed by law for that purpose, not inconsistent with the Constitution, for it includes the idea of creating the right and leaving to the legislature the duty of devising the remedy, while the opposite construction would involve the idea that the Constitution itself has afforded the proper remedy by destroying the validity of what is done against its provisions, thus placing legislation on that subject beyond the reach of the legislature.

It must therefore be concluded that the proper effect of the Constitution is to invest the debtor with a right to demand exemption in certain cases, in behalf of certain descriptions of property held by him as the head of a family. This right does not differ in its nature from other rights that may be made available by action or defense. It is true it looks to the protection of existing enjoyment rather than to future acquisitions, but numberless rights of action and defense are given for a similar purpose that are subject to the same rule.

As has been already said, when there are conflicting rights to any subject of property, they are always adjusted according to their relative priorities, having regard to the time when they commenced to be operative, so as to create a vested interest in such property. It cannot be disputed that the execution in the present case took, by the levy, a lien, a special property, in the horse levied upon, for the purpose of the execution, and that such lien existed effectively in the hands of the sheriff, as the agent of the law and of the parties, from the time of the levy. The right of homestead subsequently arising, was necessarily subordinate to this right, because later in point of time.

It has already been said, in substance, that if a subsequently accruing right of exemption could defeat the lien of an execution levied upon personal property, it could also defeat the lien of a judgment upon land. There is no difference in the nature of these two liens, as they are allowed for the protection of the same rights and follow the same general principles. The difference between them is in the steps by which they are respectively acquired and the mode of realizing from them, arising from the difference between real and personal property. Both are equally amenable to the rule that rights must be determined according to their respective priorities. Thus, no ground of distinguishing the two

Parker v. Jacobs.

appears, as it regards the effect upon them of rights subsequently arising.

From the foregoing conclusions it is manifest that the plaintiff obtained, by the acquisition of the general right of homestead, no rights as against the lien taken by the execution previously levied, and was accordingly properly nonsuited.

The appeal must be dismissed.

Appeal dismissed.

McIVER and McGOWAN, A. JJ., concurred.

PARKER V. JACOBS.

(14 S. C. 112.)

Mortgage — after-acquired personal property — delivery.

A mortgage of personal property, of which the mortgagor has no possession or right of possession, and which is not the natural product of property of which he has possession or right of possession, is invalid against antecedent creditors, subsequently obtaining judgment and levying upon the same before delivery. (*See note, p. 728.*)

Delivery of personal property to a railroad company for shipment to a mortgagee thereof is not delivery to the mortgagee at his residence, to be sold by him as factor, and does not transfer the title.

ACTION to recover personal property. The opinion states the case. The defendant had judgment below.

Dozier & Gilland, for appellants.

J. A. Kelley, contra.

McIVER, A. J. This was an action to recover the possession of ten barrels of spirits of turpentine and forty-eight barrels of rosin, upon which the defendant had levied under an execution against Ward & Hinson, and which the plaintiffs claimed under a mortgage executed by Ward, one of the members of that firm, to them, prior to the recovery of the judgment upon which such execution was issued.

It did not appear from the original record submitted here whether

Parker v. Jacobs.

the turpentine and rosin, the subject of this suit, was the product of a turpentine farm in the possession or under the control of the mortgagor, Ward, at the time the mortgage was executed, or whether it was subsequently bought by him; and the counsel engaged in the cause agreed that the Circuit judge should be requested to amend the "case" by a further statement of the evidence upon this point. In this additional statement, which has been filed with the original record, as a part thereof, the Circuit judge says: "There was no evidence before me as to whether the crude turpentine, from which the rosin and spirits were made, was the product of a turpentine farm worked by W. A. Ward, or was bought by him. *

* * The witness, W. A. Ward, the mortgagor, only said that the rosin and spirits of turpentine were made in his 'business in this county,' which included purchasing crude turpentine as well as making it on turpentine farms." Now, as the burden of proof is upon the plaintiffs, and as they, according to this statement, have not shown that the property in dispute was in the possession of the mortgagor at the time of the execution of the mortgage, or that it was the natural product of any thing then in his possession or under his control, the precise question which we are at first called upon to consider is whether a mortgage of personal property of which the mortgagor has no possession or right of possession at the time, and which is not the natural product of something of which he then has either the possession or right of possession, confers any rights upon the mortgagee, after the property is acquired by the mortgagor, and before it is delivered to or taken possession of by the mortgagee under the mortgage.

There can be no doubt that the rule *at law* is that it is necessary to the validity of the mortgage that the mortgagor should have a present property, either actual or potential, in the thing mortgaged (1 Jones on Mortgages, § 149), but in equity the rule is different. As is said by Judge STORY in *Mitchell v. Winslow*, 2 Story, 630, "It seems to me the clear result of all the authorities that wherever the parties, by their contract, intended to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or not, or if personal property, whether it is then *in esse* or not, it attaches, in equity, as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice or in bank-

ruptcy." This doctrine is fully established by the case of *Holroyd v. Marshall*, 10 H. L. Cas. 191, and is recognized in *McCaffrey v. Woodin*, 65 N. Y. 459; s. c., 22 Am. Rep. 644.

We take it therefore that a mortgage on personal property in which the mortgagor has no present interest, either actual or potential, is ineffectual to transfer the legal title to such property when subsequently acquired by the mortgagor, unless when acquired, possession thereof is given to the mortgagee or taken by him under the mortgage (*Moody v. Wright*, 13 Metc. 32; *Williams v. Briggs*, 11 R. I. 476; s. c., 23 Am. Rep. 518, and many other cases there cited), but that in equity, such a mortgage is effectual to charge the property, as soon as it is acquired by the mortgagor, and before possession is obtained by the mortgagee, with an equitable lien which will prevail against a subsequent judgment or attaching creditors. *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Mitchell v. Winslow*, 2 Story, 630; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *McCaffrey v. Woodin*, 65 N. Y. 459; s. c., 22 Am. Rep. 644.

Let us apply these principles to the case under consideration. The language of the mortgage clearly shows an intention to give a lien, not only upon the spirits of turpentine and rosin then in the possession of the mortgagor, but also upon all "which he may produce or prepare for market or otherwise acquire." It is certainly broad enough to cover, not only the turpentine and rosin which might be the product of either of the farms mentioned in the mortgage, but also any that the mortgagor might purchase or otherwise acquire. Assuming then that the property in dispute was not the product of either of the farms mentioned in the mortgage but was bought by the mortgagor subsequent to the execution of the mortgage, yet according to the principles above established, the plaintiffs were entitled to an equitable lien thereon as soon as it was acquired by the mortgagor, though they could not be said to have a legal right thereto until it was delivered to or taken possession of by them under the mortgage.

The next inquiry is, whether the property in dispute, after it was acquired by the mortgagor, was delivered to or taken possession of by the mortgagees before the rights of third persons had intervened by the levy made by the sheriff. According to the terms of the mortgage the mortgagor bound himself to "consign, send, ship and deliver to the said J. H. Parker & Co., in Charleston, all the crude turpentine, rosin and spirits of turpentine already made by

him and to be made by him, or owned or to be owned by him ;
* * * also, all the crude turpentine, rosin and spirits of turpentine that he shall purchase in his general business, to be sold by the said J. H. Parker & Co., as factors, on the usual commissions," etc The delivery by the mortgagor to the railroad company of the property in dispute, to be carried to the plaintiffs, in pursuance of the above-recited covenant, was not, in our judgment, such a delivery to, or taking possession of, by the mortgagees under the mortgage as would perfect their legal title. The purpose was that the property should be delivered to the plaintiffs to be sold by them as factors. It never was actually delivered into the possession of the mortgagees, and the legal title was never transferred to them. The test of this is that if the property had been lost or destroyed before it reached Charleston the loss would have fallen upon the mortgagor and not upon the mortgagees. The agreement was to deliver in Charleston, and until the property reached that place it could not be said to be delivered in accordance with the terms of the agreement, and therefore the legal title never passed to the plaintiffs by delivery. There was no transfer, by writing, as in the cases cited upon this point by the appellants ; the mortgage, as we have seen, being insufficient for that purpose, so far as the subsequently acquired property was concerned, and as there was no delivery, the legal title never passed.

The plaintiffs must therefore rely solely upon their equitable rights, which as we have seen, they acquired by virtue of the mortgage, even before the property was delivered to or taken possession of by them. The question then is narrowed down to the inquiry whether this equitable lien of the plaintiffs can prevail against the execution under which the defendant levied upon the property in dispute. This execution was issued to enforce a judgment recovered in March, 1879, and could have no lien on the property until it was levied, and as the equitable lien of the plaintiffs arose as soon as the property was acquired by the mortgagor, it was, of course, prior, in point of time, to the lien of the execution. The real question therefore is whether an equitable lien can prevail against the lien of an execution subsequently acquired. In *Dow v. Kerr*, Spear Eq. 417, JOHNSON, Ch., says: "The language of all the books is that an agreement to mortgage is an equitable lien and has precedence of subsequent judgments and all general creditors." To support this proposition he cites *Massey v. McIlwain*, 2 Hill Ch.

Steele v. Atkinson.

428; *Reddos v. Gaillard* (which should be *Read v. Adm'r of Simons*), 2 Desaus. 552. To same effect, see also *Welsh v. Usher*, 2 Hill Ch. 167; *Bank v. Campbell*, 2 Rich. Eq. 191. It is true that the question in all these cases arose prior to the act of 1843, and therefore if, as in the case of *Boyce v. Shiver*, 3 S. C. 515, the controversy was between an equitable mortgagee and a subsequent creditor or purchaser, the result would be different. But here there is not only no evidence that the defendant or those whom he represents occupies the position of a subsequent creditor or purchaser, but from the fact that the judgment was recovered in March, 1879, only about two months after the execution of the mortgage, the reasonable inference is that the creditor, whose execution the defendant was attempting to enforce, was an antecedent creditor.

[Omitting a question of form of action.]

The judgment of the Circuit Court is reversed and a new trial is ordered.

Judgment reversed.

WILLARD, C. J., and MCGOWAN, A. J., concurred.

NOTE BY THE REPORTER.—In *Chase v. Denny*, Massachusetts Supreme Court, April, 1881, the court said: "It has been repeatedly held in this Commonwealth that a mortgage purporting to convey all the chattels of specified kinds which may thereafter be acquired by the mortgagor, does not give any title to those chattels when acquired by him unless the mortgagee takes possession of them. *Jones v. Richardson*, 10 Metc. 481; *Barnard v. Eaton*, 2 Cush. 294. If however the after-acquired property is taken by the mortgagee into his possession before the intervention of any rights of third persons, he holds it under a valid lien by the operation of the provision of the mortgage in regard to it. This is stated to be the rule in *Moody v. Wright*, 18 Metc. 17, and there is no reason to question its correctness. See *Mitchell v. Black*, 6 Gray, 100, *McCaffrey v. Woodin*, 66 N. Y. 459; a. c., 22 Am. Rep. 644; *Walker v. Vaughan*, 38 Conn. 577." Compare *Cotten v. Willoughby*, 38 N. C. 75; a. c., 35 Am. Rep. 564.

STEELE V. ATKINSON.

(14 S. C. 154.)

Administrator de bonis non — collusive compromise of debt by predecessor — evidence — sheriff's receipt on execution.

An administrator *de bonis non* cannot set aside a transaction between his predecessor and a debtor of the estate, on the ground of a fraudulent collusion between them.

A final indorsement by a sheriff on an execution of the receipt of a small sum "in full of this case" is presumptively a satisfaction of the execution, although the sum of the indorsements is much less than the amount of the judgment.

Steele v. Atkinson.

ACTION on a judgment. The opinion states the case. The defendant had judgment below.

W. B. Wilson and G. J. Patterson, for appellant.

John J. Hemphill, contra.

MOIVER, A. J. E. M. Kirkpatrick, as administrator of the McKelveys, recovered a judgment against the defendants for a large sum of money, and on May 29, 1873, gave to the defendants a receipt, acknowledging the payment "by them of \$6,000 in full of the balance of the debt and interest in this case," a memorandum of which was entered on the execution by the sheriff. There are also two other credits entered upon the execution by the sheriff, one dated April 19, 1873, of \$1,300, expressed to be "in part of this case," and another of \$30, dated June 7, 1873, expressed to be "in full of this case." The letters of administration previously granted to Kirkpatrick having been revoked, and letters of administration *de bonis non* having been granted to the plaintiff, he brings this action in that capacity. The plaintiff, in his complaint, recognizes the validity of the first credit of \$1,300, and without taking any notice whatever of the last credit of \$30, which, as we have seen, is expressed to be "*in full of this case*," seeks to have the entry of the credit of \$6,000 vacated and set aside, and the judgment enforced for the balance due thereon, after deducting the credit of \$1,300 on April 19, 1873, upon the ground of a fraudulent collusion between the former administrator, Kirkpatrick, and the defendants.

It appears to us that the plaintiff, in the outset, encounters an insurmountable obstacle which effectually prevents him from maintaining this action. He, as administrator *de bonis non*, is seeking to set aside a transaction between his predecessor and a debtor of the estate upon the ground of a fraudulent collusion between them. He is not asking that the estate be protected from a fraud practiced upon his predecessor, the former administrator, but the ground of his complaint is that such preceding administrator himself fraudulently colluded with the debtor to the prejudice of the estate. The case of *Johnston v. Lewis*, Rice Eq. 40, conclusively shows that the plaintiff cannot maintain the action. In that case the plaintiffs, as administrators *de bonis non*, attempted

to set aside a sale of property of their intestate upon the ground that the same was made by a fraudulent collusion between their predecessor, the former administratrix, and the defendant, who was the purchaser at the sale. In the Circuit decree, JOHNSTON, Ch., at pages 42-3, says: "It is true that both creditors and distributees, if defrauded in any manner by the sale, might bring their bill against Lewis and the administratrix, and set it aside for collusion between them. But the administratrix, as such, could never impeach a transaction for a fraud to which she was a party. Then the question is whether these plaintiffs can set the sale aside. They are neither creditors nor distributees. The bill is not filed in either of these characters. The plaintiffs come forward as successors in office to Mrs. Pickett to unravel transactions by which she was bound. But nothing seems plainer than that all acts binding upon a predecessor are equally binding upon a successor." And HARPER, Ch., in delivering the opinion of the Court of Appeals, at page 46, says: "We concur with the chancellor that the present complainants, the administrators *de bonis non*, stand in the place of the first administratrix, and are bound wherever she could be bound, and concluded by whatever would conclude her. * * * The administratrix, in general, represents all creditors and distributees, and they cannot be heard but through her, and are bound by her acts. Only in a case of a fraudulent collusion to misapply the assets, these may be followed by creditors and distributees themselves, but certainly not by her successors in administration." In this case there are no creditors or distributees before the court complaining of a waste or misapplication of the assets, and from what is stated at the bar, it is not likely there ever will be, as it is said that none have been discovered in the quarter of a century which has elapsed since the death of the intestate.

But even were the action maintainable by a person occupying the position of the plaintiff, it must fail, in this instance, for the want of sufficient proof of the allegations upon which it rests. The finding of the jury, approved by Circuit judge, negatives the fraud charged, and it would require much more testimony than we have been able to discover in the "case" submitted here to warrant us in disregarding their concurrent finding.

It is contended however that as matter of law the payment of a smaller sum at or after the day the debt is due can never operate as a satisfaction of a greater sum, and that the plaintiff is therefore

Vaughan v. Fowler.

entitled to enforce the execution for the balance which may be found due after deducting all the amounts credited on the execution. Without entering at this time into any discussion of the rule of law upon which this position is based, it is sufficient for us to say that it does not apply in the present case, for it ignores the fact that there is another credit upon the execution, subsequent in date to the one under consideration, which the sheriff acknowledges to be "in full." Such a receipt, in the absence of any proof to the contrary, must be given its full force, and amounts to an acknowledgment that the whole amount due has been paid. For though it may be shown by actual calculation that the amount mentioned in the receipt, added to the other credits indorsed, would not extinguish the whole amount due, yet the acknowledgment that it is in full presupposes that there were other payments, and until such is shown not to be the fact, it must be given the effect of a receipt in full. *Henderson v. Moore*, 5 Cr. 11; *Trimmier v. Thomson*, 10 S. C. 190.

[Omitting a minor point.]

We do not see how in any view of the case the plaintiff can maintain this action, and the judgment of the Circuit Court is therefore affirmed.

Judgment affirmed.

WILLARD, C. J., and MCGOWAN, A. J., concurred.

VAUGHAN V. FOWLER.

(14 S. C. 355.)

Negotiable instrument — alteration — sealing note.

An unauthorized sealing of a negotiable note after execution renders it void.

ACTION on a promissory note. The opinion states the case. The defendant had judgment below.

Farlington & Moore, for appellant.

W. L. Wait, contra.

Vaughan v. Fowler.

McGOWAN, A. J. This was an action on a note for \$100, dated July 19, 1872, signed by Fowler & Walker, and Elizabeth Fowler, the defendant, with a seal after her name. Fowler & Walker were a firm, and as such executed the note at the time of its date, when Fowler was alive. He afterward died, and the defendant, as his widow, signed the note. It does not appear in the case at what time she signed it. It is stated in the argument of counsel that it was "in the spring of 1876," but that fact not appearing in the case, it cannot be considered. The evidence was conflicting as to the circumstances under which she signed, and as to the seal being on the note at the time she signed it. The defense was the Statute of Limitations, want of consideration and the alteration of the paper by adding the seal after its execution by some other than the defendant, and without her knowledge or consent. The jury found for the defendant. The plaintiff moved for a new trial, and that being refused, appeals to this court upon the following grounds:

"1. Because his honor erred in charging the jury that the plaintiff was not entitled to recover on the instrument in writing sued on, if it was shown by the proof that the seal which appeared to said instrument was not affixed at the time the defendant signed the same."

"2. His honor should have charged the jury that the alteration of the instrument by affixing the seal thereto could not invalidate said instrument, unless said seal was essential in law to such recovery."

"3. Because the alteration of the instrument sued on by affixing the seal thereto, although it may have been done after its execution, was not a material alteration in law, and worked no detriment or injury to the defendant, because the plaintiff was entitled to recover on said instrument against the defendant without its being sealed."

These exceptions relate entirely to the charge of the Circuit judge upon the subject of the addition of the seal, which was in these words: "That the seal, if put on the note after the execution and without the knowledge or consent of the defendant, was such a material alteration as would vitiate the contract, and the plaintiff could not recover."

It is insisted that this was error. That the alteration of the instrument by affixing the seal thereto was not a material alteration in law to invalidate it, unless the seal was essential to the recovery,

Bank of Charleston National Banking Association v. Zorn.

and that it was not so essential for the reason that the note was recoverable without the seal.

It is well settled that "any alteration of a written security in a material part renders it altogether void." *Stagg v. Popson*, 1 N. & McC. 102; *Mills v. Starr*, 2 Bail. 359; *Smith v. Cheney*, 1 Hill (S. C.), 148. Was the addition of the seal a material alteration? We have not been cited to any case in our own reports deciding the precise point, but upon principle it seems to us that there can be no doubt that it is a material alteration. "A change in the character or effect of the instrument, whether in respect to its obligation or to its weight in evidence, is a material alteration. Thus, the addition of a seal to the signature of the maker of a note converts it into a bond against which no plea of want of consideration can be made, and this invests his contract with attributes which he declined to impart to it. Consequently, the note is avoided." 2 Dan. on Neg. Inst. (2d ed.), § 1391; *United States v. Linn*, 1 How. 104.

It does not appear who made the alteration, but when on the production of an instrument it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance. 1 Greenl. on Ev., § 569.

We see no error in the charge of the judge. The judgment is affirmed and the appeal dismissed.

Judgment affirmed.

SIMPSON, C. J., and McIVER, A. J., concurred.

BANK OF CHARLESTON NATIONAL BANKING ASSOCIATION V. ZORN

(14 S. C. 444.)

Negotiable instrument — payment — placing funds at place of.

The maker of a note, payable at the office of his factors, placed sufficient funds there on the day of maturity to pay it. In a subsequent settlement with his factors he was credited with the amount, but the note was not taken up or produced. The factors had transferred it before maturity to a purchaser in good faith, who had neglected to present it for payment at maturity. The factors subsequently failed. *Held*, that the transferee could not maintain an action thereon against the maker. (*See note, p. 736.*)

Bank of Charleston National Banking Association v. Zorn.

ACTION on a promissory note. The head-note and opinion show the facts. The defendant had judgment below.

John R. Bellinger, for appellant.

John J. Maher, contra.

SIMPSON, C. J. [Omitting minor points.] The fourth exception raises the question that the respondent was bound to take up his note when he settled with Wroton & Dowling, and that it was error on the part of the judge not to so charge when requested.

The note was due on the 1st of October, 1876, and payable at the office of Wroton & Dowling, in Charleston. The respondents lived in Barnwell county, and the final settlement was made between the parties on the 18th of January, 1877, whether in Charleston or Barnwell does not appear. The theory of the defense is that funds had been left in the hands of Wroton & Dowling to pay this note as far back as October of the preceding year. It seems that it was known by respondent that his note might be deposited with some bank and that the bank was entitled to these funds in the hands of Wroton & Dowling. All therefore that the respondent was concerned about in the settlement was that he should get credit for this amount which he had left at the place of payment. This he received in the settlement, and we do not see that his failure to demand and take up the note was in violation of his legal duty; nor was it error in the presiding judge to decline to so charge; parties are presumed to know the law.

This note on its face was payable at the office of Wroton & Dowling on October 1, 1876, and when the respondent left there on that day the amount required to pay it, it was in effect discharged in the hands either of the payee or any other holder. If he had withdrawn the funds from Wroton & Dowling and paid the note on the day of settlement without taking it up, then he might have been responsible to any third party who may have held it, but this was not done.

The settlement embraced the transactions of the year between the parties, and in the settlement, as we understand it, the respondent was allowed a credit for this note on October 1, preceding, when it fell due.

The last exception alleges error in that the judge charged that

Bank of Charleston National Banking Association v Zorn.

the bank was bound to demand payment at the office of Wroton & Dowling, etc. The English commercial law, when strictly applied and enforced, seems to require that demand shall be made at the place of payment, when specified in the note, either on the day of payment or at some future time, and without this, no default arises on the part of the maker for non-payment.

The American doctrine however is not so rigid; demand is not a precedent condition here, and suit may be brought against the maker under that doctrine without presentment or demand at the place mentioned, subject however to the right of the maker to prove by way of defense that on the day and at the place specified he had the necessary funds to make payment, and that if any loss has occurred it should be the loss of the holder of the note and not his; in other words, the burden of proof is shifted; instead of requiring the plaintiff to prove that he made demand, the maker, defendant, is required to prove that he deposited the money according to the terms of the note, and that it was lost to the plaintiff on account of his failure to demand it at the proper place. *Wallace v. McConnell*, 13 Pet. 136; Story on Prom. Notes, §§ 227, 228, and note to p. 287, *Wolcott v. Van Santvoora*, 17 Johns. 248; 8 Am. Dec. 396, *Clarke v. Gordon*, 3 Rich. 313.

Now, if the matter complained of in the last exception had stood alone in the judge's charge, the exception would be well founded, as the charge in this respect is not in accordance with the above principles; but when the whole charge on this branch of the case is taken together, as appears in the brief, it is apparent that the judge properly qualified the doctrine as a whole when he instructed the jury "that if they believed the plaintiff was guilty of *laches* in not demanding payment of the note at the office of Wroton & Dowling before their failure, and that plaintiff would have received the money if the note had been presented, and by their failure to do so the defendant lost the money, they should find for the defendant."

This is, we think, in accordance with the American doctrine, and was a part of the judge's charge, and properly qualified that which, when taken in detached portions, might be regarded as error.

The judgment below is affirmed and the appeal dismissed.

Judgment affirmed.

McIVER and McGOWAN, A. JJ., concurred.

Bank of Charleston National Banking Association v. Zorn.

NOTE BY THE REPORTER. — In *Indig v. National City Bank*, 80 N. Y. 100, plaintiff deposited with defendant, for collection, a note on which there was no indorser save the maker payable at the Bank of Lowville, of which bank the maker was a customer. Defendant sent the note by mail to that bank, which was an ordinary method of transacting such business. The note reached said bank the day it fell due; upon the next day it sent its draft on New York in payment, and on the same day failed. The maker had not quite sufficient on deposit to pay the note; the deficit was made up after the failure. Defendant received the draft the next day, which was Saturday, after business hours; it forwarded it on Monday morning, in the usual course of business, to the clearing-house in New York, and it was returned "not good." Defendant immediately gave plaintiff notice of non-payment. In an action to recover the amount of the note, because of alleged negligence, *held* (MILLER, EARL and DANFORTH, JJ., dissenting), that plaintiff was properly nonsuited, because as there was no evidence that the maker was insolvent, it did not appear that plaintiff sustained any damage. The court said: "It is by no means clear that the maker of the note is discharged. Where a note is payable at a bank an entire failure to present it for payment does not discharge the maker. *Wolcott v. Van Santvoord*, 17 Johns. 248; 8 Am. Dec. 396; *Green v. Goings*, 7 Barb. 652; *Caldwell v. Cassidy*, 8 Cow. 371. If the maker has not sufficient funds in the bank the omission to present it is of no consequence. If he has funds then he can plead it by way of tender, and is relieved from liability only for interest and costs. And even if the bank fails with the funds in its hands, this is no defense to the note. *Ruggles v. Patten*, 8 Mass. 480; *Fenton v. Goundry*, 18 East, 473; *Turner v. Hayden*, 1 B. & C. 1. The bank is in such cases regarded simply as the agent or depository of the maker of the note or acceptor of the bill, and he alone suffers by its failure, and his promise to pay is not discharged. In this respect only, a note or bill payable at bank differs from a check. Therefore if there had been no presentment whatever, and the bank had failed with sufficient funds of the maker in its hands to pay the note, the maker is still liable." This is exactly contrary to the opinions of the principal text-writers. The three cases last cited do not support the opinion, but are only to the same effect as the first three. There are however *dicta* to support it in *Rhodes v. Gent*, 5 B. & A. 244; *Silver v. Henderson*, 8 McL. 165; *Wallace v. McConnell*, 18 Pet. 143.

Lazier v. Horan, Iowa Supreme Court, Dec., 1880, is in exact harmony with the principal case. The court said: "In Story on Promissory Notes, § 298, this language is used: 'If by such omission or neglect of presentment and demand, he (the maker or acceptor) has sustained any loss or injury, as if the bill or note were payable at a bank, and the acceptor or maker had funds there at the time, which have been lost by the failure of the bank, then and in such case the acceptor or maker will be exonerated from liability to the extent of the loss or injury so sustained.' To the same effect see Story on Bills of Ex., § 366: 1 Para. on Cont. 372-3, 1 Dan. on Neg. Inst., § 643.

"It is correct, as claimed by counsel for appellee, that these writers cite no authority which supports the proposition announced by them. But notwithstanding this, the views of these learned authors are entitled to proper consideration. On the other hand, no case has been cited which announces the opposite view from that given in the above citations. With the limited time at our disposal, we are unable to make an exhaustive search for authorities, and in this case we have found none which are fairly in point. In *Howland v. Levy*, 14 La. Ann. 293, it was held when a note was payable at the office of a commercial firm in New Orleans, and at maturity it was presented by the holder at the place named for payment, and payment refused, and a few days after maturity the maker remitted part of the sum to the mercantile firm to be applied on the note, that this was no payment. It will be observed from this statement that the case is wholly different from that at bar. Here, if the note had been presented at maturity it would have been paid, for the money was in the bank for that very purpose. It would, perhaps, be an unreasonable requirement to hold that the holder of the note or bill should present it again for payment.

"We think that upon principle, the defendant in this case should be wholly discharged, and we will briefly state our reasons therefor. The note was made payable at a bank. These institutions are depositories of money. They are also collection agencies, through which by much the larger part of that branch of the business of the country is transacted. When a note is made payable at a bank the parties expect the collection to be made through the bank. It is true when the defendant deposited the money, the bank, while

Dial v. Gary.

holding it, was technically the agent of the depositor. But the money was deposited for the holder of the note, and it required no act of the depositor to authorize the bank to pay the note. 'If the customer of a banker accept a bill and make it payable at his banker's, that is of itself a sufficient authority to the banker to apply the customer's funds in paying the bill.' Byles on Bills, 151. And if money be deposited for the payment of such a bill or note, the holder may maintain an action against the bank therefor. Pars. on Coml. Law, 180. By the very terms of the contract the defendant agreed to pay the note at the bank. Now, while it is a general rule that payment of a note or bill should be made to the actual holder, yet when the parties have contracted that payment may be made at a bank it means that payment is to be made to the bank. The parties to this note did not contemplate that the payee should make a journey from Indianapolis and meet the maker at Allen's bank, and there receive his money from the hands of the maker and deliver him the note.

"This court has three times determined that when the maker of a promissory note payable in personal property, to be delivered at a specified time and place, makes a tender of the specific articles and sets them apart at the time and place stipulated, and the creditor is not there to receive, or refuses to accept the property, the debt is thereby discharged and the title to the property passes to the creditor. *Gaines v. Manney*, 2 Green, 251; *Williams v. Triplet*, 3 Iowa, 518; *State v. Shripe*, 16 id. 86. Now, while it is held in these cases that upon designating the property and setting it apart for the creditor the title of the property passes, and it may be said that by the deposit of the money in the bank for the holder the right of property in the money does not pass because the depositor may withdraw it, yet this distinction is really not an important one, for as we have seen, if the money remains on deposit the holder of the note may present his note and take the money, or if necessary maintain an action for it. In one of the cases cited the note provided for payment in brick. Now, if that could be discharged by delivering the brick set apart for the creditor at the time and place designated, it is difficult to see why, if the note was payable in dollars it would not equally be a discharge to set apart and deposit the dollars for the holder of the note."

DIAL V. GARY.

(14 S. C. 573.)

Action — conflict of law — bond assigned by foreign administrator.

A resident of Massachusetts died there, possessing a bond and mortgage executed by a resident of South Carolina. His administrator sold and assigned the securities to a resident of South Carolina, who brought suit upon them there. *Held*, not maintainable.

ACTION of foreclosure. The opinion states the case. The defendant had judgment below.

Bauskett & Lynch, for appellant.

Melton & Clark, contra.

SIMPSON, C. J. These cases were heard together below on de-
VOL. XXXVII—93

murrer to the complaints. The facts were the same in each. It appears that respondents, in December, 1874, executed to Asa Burke, a resident of the State of Massachusetts, their bond in the penal sum of \$8,000, conditioned to pay \$4,000 on December 1, 1876. This bond was secured by mortgage of real estate situate in Richland county of this State. Asa Burke died in 1879, in Massachusetts, and one Philip Snowden, of that State, was appointed his administrator there by the Probate Court of Suffolk county, Massachusetts. Whereupon this administrator, for value, assigned to the appellant, Dial, a resident of this State, the said bond and mortgage due by respondents, also residents of this State.

Upon this bond and mortgage these actions were instituted by Dial. Respondents demurred to the complaint, and upon the hearing below the actions were dismissed.

The leading questions raised in the appeal, in fact we might say the single question, because although there are numerous exceptions, they all hinge upon this, is: Whether the plaintiff (appellant), being the holder of a bond purchased by him from a domiciliary administrator abroad, has the right and legal capacity to sue said bond in this State, where the debtor resides, and where he, the appellant, resides.

“The owner of personal property, while alive, has always the possession or the right of possession to such property in whatever part of the civilized world it may be situated,” says Judge BUTLER in *Carmichael v. Ray*, 1 Rich. 116: “His possession follows his title, and while alive, he may transfer and assign it to whomsoever he may see proper. And he needs no special authority for this purpose from the laws of the place where the property is situated. He can act in reference to it as any citizen of the place can act as to his property. But it is a mistake to suppose, that upon his death, his legal representatives, appointed under the laws of his domicile, are invested with like title and power as to all such property; while the owner, when alive, is clothed with this authority, yet his death is an event which changes the character of the title, and invests new parties with power over his estate.”

It is the duty of every government to protect its own citizens, and especially the rights of creditors, as the material and commercial prosperity of a country depends greatly on this protection and security. If a government fails in this, it fails in one of its most important functions and duties. To this end therefore it is well

Dial v. Gary.

understood that the different governments in which the movable property of a deceased may be left, upon his death, are authorized to intervene and take control. Hence, in every State we find laws declaring in whom such property within its limits shall vest, and in what manner it shall be administered. True, if the decedent has left a will or testament, upon such testament being established under the *lex domicilii*, it will usually be confirmed under the jurisdiction where the property is found. And the title of the executor, as well as the disposition of the property therein appointed and directed will be recognized there. But this confirmation must take place and be had in accordance with the laws of the *rei sitæ* before even an executor under such testament can intermeddle with the property. But in cases of intestacy there must be a grant of administration in such jurisdiction where property is found; it being well settled that the grant of no State, not even the grant of the State of domicile, can extend beyond the territory of the government which grants it. Nor can it invest the administrator with title to any movable property, except to such as may be found within its limits.

These are the general principles applicable to executors and administrators in cases like this. 1 Wms. on Ex'rs, 320, and cases there cited, notes, 321, 322; Story Conf. of Law, §§ 512, 524.

It has been held in several cases in this State that a foreign administrator has no legal capacity to sue here. He cannot sue, because his appointment stops at the boundary of the State which appointed him, and because the title of the decedent's property, found here, under our laws, can only vest in an administrator appointed here. *Carmichael v. Ray*, *supra*; *Tilman v. Walkup*, 7 S. C. 60; *Richardson v. Gower*, 10 Rich. 109.

Now if the administrator of Asa Burke, appointed in Massachusetts, his domicile, had brought these actions, can there be a doubt that a demurrer would have been fatal? Or if the property in question was movable, tangible property, such as horses, cattle, wares and merchandise, located in this State at the time of the death of Burke in Massachusetts, could his administrator, appointed there, institute suit for the recovery of such property? The right to sue for the recovery of property springs from title. Without title no right of action can exist under the authorities referred to above. No title to property could vest in a foreign administrator. Neither would a foreign administrator have the power to

sell or transfer such property, and for the same reason — the want of title.

It may be said however that while the principles announced above may be admitted, yet on the other hand, it will also be admitted that if such property had been found in Massachusetts, the place of Asa Burke's death, his administrator there would have the power to sell, and that the title of his vendee in such sale would be recognized, not only in Massachusetts but in every State, and wherever it might become necessary for him to enforce it. And it is contended that the bond and mortgage in this case being in the possession of Burke at his death, in Massachusetts, constituted a part of his effects and personal property in that State, to which administration there attached, giving the right to his administrator, Philip Snowden, to sell and transfer, and therefore that his assignment to appellant was valid.

This brings up the real question in the case. The bond sued on is technically a chose in action. Is a chose in action property, or merely the representative of property? Is it the substance or shadow? And where the obligor and obligee reside in different States, is the property involved in the bond to be regarded as situated in the domicile of the debtor or that of the creditor? If the bond followed the person of the debtor, and is to be considered as *bona notabilia* in the State where he resides, then the demurrer was properly sustained. If however it followed the person of the creditor, and is to be considered property in Massachusetts, then, if the laws of that State have been complied with, the appellant's title would be good. The term "chose" signifies thing or property. In law it is applied to personal property, as choses in possession are such personal things of which one has possession. Choses in action are such as the owner has not possession of, but merely a right of action for their possession. 2 Bl. Com. 389, 397 ; 1 Chit. Pr. 99.

A chose in action then embraces two ideas : first, a visible, tangible thing, and second, the right to sue for and recover that thing. These are separate and distinct elements, and the one may be situated in one locality and the other in another.

In the case now before the court the chose or thing is situated in South Carolina, and the evidence of the right to sue, at the death of Burke, was in Massachusetts, but that right could not be exercised in that State even by Burke himself, at least so long as the debtor continued in this State. In this view both the thing and

Dial v. Gary.

the right to sue for it belonged to South Carolina, and according to strict law, ought to be subject to administration here. Otherwise the great object of each State or government, retaining control over the property of an absent decedent, would be defeated entirely. If a foreign administrator, by virtue of finding choses in action in the possession of his intestate at the time of his death abroad on persons in other States, is so far invested with title as to enable him to assign such choses in action to a third party, the rights of domestic creditors might be wholly destroyed, and all of the laws providing local administration under local authorities for the protection of such creditors eluded and overthrown. It would seem then, upon principle, that the appellant took nothing by the assignment to him of the bond and mortgage in question. It is true however that the decisions in the different American States and in England are not uniform upon this subject, and they leave the question presented here in considerable doubt.

In *Leake v. Gilchrist*, 2 Dev. 75, it was broadly and distinctly held that debts due by specialty follow the person of the obligee and are assets of the domicile. In that case an assignment by the administrator of the domicile in South Carolina of a bond on a citizen in North Carolina was recognized as valid, and suit brought by the assignee in North Carolina was sustained.

In the case of *Harper v. Butler*, 2 Pet. 239, the Supreme Court of the United States sustained an assignment of a promissory note due the estate from a citizen of Mississippi by an executor in Kentucky, without probate of the will in the former State, but in that case the debt was contracted in Kentucky, where the testator lived and died, and the assignment was made by an executor.

In *Doolittle v. Lewis*, 7 Johns. Ch. 46 ; 11 Am. Dec. 389, an administrator of a creditor, who died in Vermont, having in his possession a bond and mortgage of real estate from a citizen of New York, sold said real estate in payment of the bond, but in that case the mortgage contained a power to the mortgagee, his executors, administrators, or assigns, to sell and convey, and the chancellor, in pronouncing judgment, based the right to sell on this power, saying that the whole proceeding was extra-judicial and founded on private agreement. He did not recognize the administrator as such, or that he had any power by virtue of his foreign appointment, but he recognized the agreement of the parties. * * *

In this case it was said that a payment by a debtor to a foreign

administrator would acquit the debtor. This, no doubt, is good law where no administration has been taken out in the State of the debtor, and especially where the intestate has no creditor there.

In *Peterson v. Chemical Bank*, 32 N. Y. 22, the right of assignee to sue was sustained, but there was full evidence offered that the intestate owed no debts in New York, and therefore the rights of creditors were not in the way.

On the other side, in the case of *Stevens v. Gaylord*, 11 Mass. 267, Judge JACKSON said: "If a foreigner or a citizen of any other of the United States dies, leaving debts and effects in this State, these can never be collected by an administrator appointed in the place of the domicile."

In that case an absent debtor, who lived in Connecticut, had come within the jurisdiction of the courts of the State of Massachusetts, and the administrator of the creditor brought suit on notes which he had possession of by virtue of his administration in that State.

The court held that the circumstance of the defendant having come into that State, so as to expose himself to action, could not affect the general principle, and that the debtor could not be compelled to pay to any one but to an administrator duly authorized in Connecticut, where the debtor lived.

This must have been upon the ground that the administration in Massachusetts does not give title, even in that State, to notes or other choses in action of deceased parties dying there, on persons in other States. Under this case, if the debtors here had gone into Massachusetts, the administrator of Burko could not have maintained action against them in the courts there. This seems decisive of the question, especially as to the bond sued on in this case. For if the administrator, by the laws of Massachusetts, has never been invested with sufficient title to sue this bond, even in that State, and is without capacity to sue here, how could he transfer the bond to the appellant so as to invest him with power to sue?

See the case of *Cutter v. Davenport*, 1 Pick. 81.

In *Stearns v. Barnham*, 5 Greenl. 261, it was held that "an executor appointed under the laws of another State cannot indorse a promissory note payable to his testator by a citizen of this State (Maine), so as to give the indorsee a right of action here in his own name."

In *Pond v. Makepeace*, 2 Metc. 114, it was held that an adminis-

Dial v. Gary.

trator in the State of Massachusetts of one who lived and died in Rhode Island may sue for and recover a debt due by his intestate from a citizen of Massachusetts, although the administrator of such intestate, appointed in Rhode Island, had already recovered judgment in Massachusetts upon the same claim, it being undefended.

We have found no case in our own reports directly in point. But we think, upon principle and the weight of decisions elsewhere, that the order of the Circuit judge holding that the assignee had no legal capacity to sue in this case should be sustained.

The order below is affirmed and the appeal dismissed.

Order affirmed.

McIVER and McGOWAN, A. JJ., concurred.

Rehearing denied.

CASES
IN THE
SUPREME COURT
or
TEXAS.

RAILROAD COMPANY V. HALLOREN.

(58 Tex. 46.)

Carrier — negligence — railway bed — damage by sudden and heavy rain-fall.

By a sudden and extraordinarily heavy rain-fall, about dark, confined to a limited locality, a portion of a railway bed was so undermined that it gave way under the weight of a train, three or four hours afterward, and a passenger was injured. The railway bed was in safe condition before the rain-fall; a train had safely passed over it two hours before the accident; and it had been inspected between the time of the passage of that train and the time of the accident, and was apparently in safe condition. The defect was not visible at the time of the accident. The train in question was carefully run at half speed at the time in question. *Held*, that no action would lie against the company. (See note, p. 749.)

ACTION for personal injuries. The opinion states the facts. The plaintiff had judgment below.

Baker & Botts, for appellant.

W. B. Hamblin, for appellee.

BONNER, A. J. The first and second errors assigned in this case

Railroad Company v. Halloren.

bring into review so much of the general charge of the court as in effect instructed the jury that the liability of the defendant company depended upon "the manner and speed of running the train, considering the condition of the track and the state of the weather, if that in any way superinduced the accident."

The ground of complaint against the company, as alleged in the petition, was, that "the gross negligence, carelessness and mismanagement of its agents and employees, and the unsafe and dangerous condition of its road, caused the car in which plaintiff was riding to be thrown from the track and upset; whereupon and by reason of said gross negligence, carelessness and mismanagement of defendant, by its agents and employees, as aforesaid, and the unsafe and dangerous condition of its road, and the throwing off the car in which plaintiff was riding, from the track, and upsetting the same, plaintiff received great personal injury," etc.

There was no special demurrer to the petition that it did not allege the particular acts of gross negligence, carelessness and mismanagement upon the part of the agents and employees of the company; and under the pleadings had the evidence warranted the charge as given, the subject-matter of it was proper for the consideration of the jury.

The testimony showed, that about three or four hours before the accident happened, an unprecedentedly heavy fall of rain occurred in that immediate locality, but that it had not been sufficient upon the line of the road — even on that part of it — to stop or impede the regular running of the trains, and it does not show that the agents and employees in charge of this particular train, either from information or their personal observation, had notice of the character of the rain-fall in that locality, or of the damage to the road-bed; but, on the contrary, it appears that to all external appearance the road-bed and track were sound and in good order; that the train at the time was running at but little over half-speed, not by reason of any apprehended danger, but to prevent passing a place at which it was intended to take on wood.

The charge was calculated to mislead the jury by making the liability of the defendant turn upon the dangerous condition of the track and the state of the weather, without submitting, in this connection, the question of the knowledge of this condition on the part of those in charge of the train. The testimony having shown that the road-bed and track were in good condition until affected by this

Railroad Company v. Halloren.

sudden heavy rain-fall, the knowledge of this changed condition by those in charge of the train was a material ingredient in the alleged negligence, and as such, should have been submitted to the jury. *Withers v. North Kent Railway Co.*, 3 H. & N. (Am. ed.) 969; 27 L. J. Ex. 417.

The third and fourth errors assigned involve the question of the liability of a railroad company for the safe carriage of its passengers.

A carrier of passengers upon an ordinary road is not responsible for its condition, as it is not under his control and supervision. A different rule however prevails as regards a railroad corporation, which under extraordinary grants of franchise, builds, controls, and generally has the exclusive use of its road-bed and track.

A passenger on a railroad train has, by reason of the risk naturally incident to this mode of travel, the right to demand of the company for his safe passage that high degree of care and skill which very cautious persons generally, in their line of business, are accustomed to use, under similar circumstances to prevent danger. This care and skill pertains to the original construction, by competent engineers and workmen, of the road-bed, track, engines, cars, and other appliances necessary to carry on properly the business of its road and to operate its trains; the frequent and careful examination of the same to see that they have been thus constructed and have thus been kept in safe condition and repair to prevent accidents, so far as human skill and foresight could reasonably anticipate and avoid the same; and also to the employment of a sufficient number of good, steady, and competent agents and employees to so conduct and control the train as to insure its careful and skillful management.

If the company is negligent in any of these particulars, and this negligence is the legal cause of injury to the passenger, it is liable in damages. *Shearm. & Redf. on Neg.*, §§ 266, 269, 444; *Angell on Carriers*, §§ 538, 540.

Railroad companies however are not insurers of the safety of their passengers further than could be required by the exercise of such a high degree of foresight as to possible dangers, and such a high degree of prudence in guarding against them, as would be used by very cautious, prudent and competent persons under similar circumstances. *Angell on Carriers*, §§ 568, 570; *Cooley on Torts*, § 642; *Galena & Chicago R. R. Co. v. Fay*, 16 Ill. 558; *Bowen v. N. Y. C. R. R. Co.*, 18 N. Y. 411.

Railroad Company v. Halloren.

This though is not to be understood to require of the company every possible precaution which ingenuity might suggest or the skill of science might afford, by which accidents may be avoided, but that it should adopt such precautions of known value as have been practically tested, and should employ such necessary skilled labor, service and experience as is reasonably within its power to have secured.

The test of liability is, not whether the company used such particular precaution as is evident after the accident happened might have averted it had the danger been known, but whether it used that degree of care and prudence which very cautious, competent persons would have used under the apparent circumstances of the case to prevent the accident, without reasonable knowledge that it was likely to have occurred. *Shearm. & Redf. on Neg.*, § 266 ; *Bowen v. N. Y. C. R. R. Co.*, 18 N. Y. 408.

A railroad company is required to so construct its road-bed and track as to avoid such dangers as could be reasonably foreseen by competent and skillful engineers, as likely to be occasioned from the ordinary rain-falls and freshets incident to the particular section of the country through which it is constructed. But it would not be guilty of such culpable negligence as to make it liable in damages if it failed to provide against such extraordinary floods, or other inevitable casualties caused by some hidden force of nature unknown to common experience, and which could not have been reasonably anticipated by the ordinary engineering skill and experience required in the prudent construction of such railroad.

If an accident should happen from such cause on a road-bed and track which had been properly constructed and kept in good repair, when the agents and employees in charge of the train were in the due exercise of that degree of caution and prudence necessary at all times, and when they did not have, from information conveyed to them, or from their own personal observation, reasonable grounds to anticipate impending danger, and consequently did not use such extraordinary precautions as might have otherwise averted it, then the law characterizes it as an act of God, or such inevitable accident as is incident to all human works, and which would relieve the company from liability.

Even under the rigid rules of the common law, which made common carriers insurers of the safe delivery of all articles committed to their care, such cause would have excused them. *Shearm. &*

Railroad Company v. Halloren.

Redf. on Neg., § 270 ; *Withers v. North Kent Railway Co.*, 3 H. & N. (Am. ed.) 969 ; *Railroad Co. v. Reeves*, 10 Wall. 176 ; *Livercy v. Philadelphia*, 64 Penn. St. 106 ; s. c., 3 Am. Rep. 578.

The undisputed facts in this case show substantially —

1. That defendant's road was first class, only three years old, in good order at the place of the accident, and that the ties and iron were sound and good.

2. That in the latter part of the day, and about dark of the day of the accident, an unprecedentedly heavy rain fell in that locality, which was not general, but which caused the embankment to give way under the train as it passed over the place, and thus caused the disaster.

3. That the track at that place was sound and in good condition, as far as could be seen, only one hundred and twenty-five minutes prior to the occurrence, when the north-bound train passed over it.

4. That between that time and the occurrence of the accident, that section of the road embracing the place of the accident was inspected and found and left in good condition, and was still in good condition at the time the wrecked train ran on it, as far as could be seen; had its usual appearance to an engineer who had been running over it ever since the road was built.

5. That the train and engine were in good condition, having been so found, on examination, only one hour before the accident, and were properly manned.

6. That the accident occurred seventy minutes after leaving Palestine, and sixteen miles from that place, when the train was running at about half-speed, on a track which was apparently safe at all times for that rate.

7. That it had rained during the day at Palestine, but not so hard as to make it necessary to give orders in reference to the track.

The evidence, as thus disclosed by the record, shows that the defendant company had used a commendable degree of skill, prudence and vigilance in the construction and management of its road, and that the misfortune to the plaintiff was the result of one of those inevitable accidents of which passengers assume the risk, and for which the law does not hold the company responsible in damages. Ang. on Carr., § 523.

We are of opinion that the court erred in the charge as above

Railroad Company v. Halloren.

shown, and also in refusing a new trial because the verdict was contrary to the law and the evidence; for which errors the judgment is reversed and the cause remanded.

Reversed and remanded.

NOTE BY THE REPORTER.— Mr. Thompson says (Carr. Pass. 218): "It is well laid down that a railroad company, being the owner of a road as well as of its carriages, is bound to the same degree of diligence and skill as to the condition and construction of its road, as it is with reference to the condition and construction of its carriages." Mr. Hutchinson says (Carr., § 524): "The highest degree of care will therefore be required of railway companies in the construction of their road-beds, without stability in which the necessary superstructure must necessarily be infirm."

In *Brahm v. Gt. Western Ry. Co.*, 34 Barb. 256, the court refused to charge that the plaintiff could not recover unless before the accident there was some apparent source of danger to the embankment, and some apparent subsisting cause sufficient to produce the accident, which it was the duty of the defendant to provide against or remove; but charged that under such a state of things the defendant would not be chargeable with negligence. This was upheld.

In *Withers v. North Kent Ry. Co.*, 27 L. J. Ex. 417, there was evidence that the embankment ran through a country subject to floods, and had been constructed five years, of sandy soil, with insufficient culverts; that an extraordinary fall of rain of sixteen hours had caused a flood which had washed away the soil, leaving the sleepers unsupported; but there was no evidence that any thing had been seen on the line to indicate danger. The plaintiff had a verdict. *Held*, that there could be no recovery. POLLOCK, C. B., said: "The line had lasted five years in a country subject to floods, and it does not appear that there had been any accident or objection to its construction until this extraordinary flood occurred. The company was not bound to have a line constructed so as to meet such extraordinary floods." MARTIN, B., said: "If the line had nevertheless lasted five years, that tends to show that there was no reason to apprehend danger from ordinary floods, and they were not to provide for extraordinary." BRAMWELL, B., said: "It is contended, on the part of the plaintiff, that the company's servants were bound to know the consequences which were likely to follow from the flood. That is not so. They were bound to know only that which could be known by the exercise of ordinary skill and prudence."

In *Gt. Western Ry. Co. v. Braid*, 1 Moore P. C. (N. S.) 101, the accident occurred in Canada. An embankment was carried away by an extraordinary storm; the accident occurred at about 2 o'clock, A. M.; loaded trains had safely passed between eleven and twelve o'clock of the same night, and at ten minutes past one of the same morning; all appeared safe then, and there was nothing to attract attention; but the flood afterward made a gap of forty-five yards. From six o'clock of the preceding evening there had been an excessively heavy rain. The road had been used four years without accident, and was inspected daily. A verdict was found for the plaintiff. This was affirmed. Lord CHELMSFORD said: "The railway company ought to have constructed their works in such a manner as to be capable of resisting all the violence of weather which in the climate of Canada might be expected, though perhaps rarely, to occur." "In the whole of the evidence there is nothing more proved than that the night was one of unusual severity, but there is no proof that nothing similar had been experienced before, nor is there any thing to lead to the conclusion that it was at all improbable that such a storm might at any time occur. It must also be borne in mind that although the embankment had stood firm for five years, and had possibly not been exposed to any storm of equal violence to that before which it gave way, yet it was evidently not constructed, or at least not maintained, in a manner to resist any unusual pressure." "It is evident that the embankment was insufficiently provided with means of resisting the storm, which though of unusual violence was not of such a character as might not reasonably have been anticipated, and which therefore ought to have been provided against by all reasonable and prudent precautions." Some criticism of Baron BRAMWELL's opinion in the *Withers* case was made.

TEXAS BANKING COMPANY V. HUTCHINS.

(58 Tex. 61.)

Insurance — forfeiture — notice — estoppel.

In an action on a policy of insurance on a cotton-seed-oil-factory, the company defended on the ground that the policy was forfeited by the use of cotton-gins on the premises, the increase of the risk thereby, and the concealment of the fact by the insured. It appeared, however, that an agent of the company told the secretary, at another town, on the street, that the gins were being so used, but that the secretary forgot the information. *Held*, (1) that this did not as matter of law constitute knowledge on the part of the company; but (2) if it did, the company were not bound to cancel the policy.

ACTION on a policy of fire insurance. The opinion states the facts. The plaintiff had judgment below.

Willis & Cleveland, for appellant.

Baker & Botts, for appellee.

GOULD, A. J. [Omitting matters of pleading.] The court charged the jury, that "if Mohl, as agent of the company, informed Lauve, its secretary, four or five weeks before the loss occurred, that plaintiff was running cotton-gins in the insured premises, that would be notice to the company; and the latter, to avail itself of a forfeiture on account thereof (if under the proof the use of gins worked a forfeiture), should have apprised the plaintiff within a reasonable time of its intention to claim a forfeiture."

The evidence disclosed that Mohl was a local agent at Houston, not at Hempstead; that on a visit to defendant's factory at Hempstead, in June, 1872, he saw that gins were run in the factory; that in the same summer Lauve, the secretary, being in Houston, Mohl complained that he was not allowed to take risks on gins and gin-houses, and when told that the company declined all such risks, replied: "You have a risk on Ahrenbeck's cotton-seed-oil factory, and they are running gins." The secretary replied disclaiming any knowledge of any such risk, and said that if he found a policy providing for such risks, he would cancel it. The secretary testified that the conversation occurred on the street, that it passed out of

Texas Banking Company v. Hutchins.

his mind, and that he did not think of it again. He says: "If spoken to by the insured, or by any one acting for him, in relation to any fact affecting the validity of his policy, I should feel bound to act in some way on such communication; but I should not if spoken to by one having no interest in the policy."

Under these circumstances we do not think the court justified in charging the jury, as matter of law, that the company, through the information given to its secretary, had notice. The knowledge of the secretary may be equivalent to knowledge of the company; but the question is, Did the secretary owe to the holder of the policy any such duty as required him to bear in mind information thus received, and make it a rule of law that he should be held not to forget it? It is far from clear that the same rule should apply as in case of one claiming protection as an innocent purchaser without notice.

But aside from this, is an insurance company, acquiring knowledge of some concealment or breach of warranty constituting a valid ground of forfeiture, in all cases bound in good faith to notify the policy-holder of the forfeiture? If the circumstances be such as to show that the policy-holder had been guilty of no fraud or intentional wrong, we are not prepared to say that the company should not in honesty notify him of the forfeiture or cancellation, especially if under the terms of the policy the party would be entitled on the cancellation to a return of the premium or a part thereof. Even a breach of warranty might occur without any intentional wrong. The cases however which are cited by counsel for appellee do not go to the extent of estopping an insurance company from defending on the ground of concealment or breach of warranty because of its silence, where the case is one of fraud and the company would be under no obligation to return any part of the premium.

The case most relied on by the appellee is one in which, after the issuance of the policy, the holder had made a change in his business increasing the risk, which increase of risk without the assent of the company made the policy void, and if made with notice to the company entitled it to cancel the policy by paying to the assured the unexpired premium *pro rata*. *Viele v. Germania Ins. Co.*, 26 Iowa, 9. In that case the authorized agent of the company had notice from the parties, and on examining the premises assented to

Texas Banking Company v. Hutchins.

the change on certain conditions. The waiver was express, and, though not indorsed on the policy, was complete and binding.

Clearly, the case, as an authority, does not go far enough to embrace the case before us and support the charge given by the court. The judge who delivered the opinion says in reference to the facts of that case: "If the agent determined that the risk was increased, his duty to his principal and good faith toward the assured, and every principle of honesty, required him to cancel the policy and advise the assured of the fact. It was bad faith of the darkest hue for the agent, upon determining that the risk was increased, so to act and speak as to induce the owner to believe that the policy continued to cover the property. The companies thereby retained the money paid on premiums which they had not earned, and which their contract required should be repaid to the assured upon cancelling the policy, and induced their confiding customer to trust for indemnity," etc. This strong language must be taken with reference to the case before the court. It would certainly not be applicable where the defense was, that the insured had been guilty of fraud, which was discovered without his agency, and when, though the policy were forfeited, he would be entitled to no return of premium. An equitable estoppel could not be made available to protect a party guilty of fraud from the consequences of that fraud. We are not called on, in the present attitude of the case, to lay down rules on the subject of waiver which may meet every possible phase of the case on another trial. The subject is one of too much doubt and difficulty to require of us such a course, and we content ourselves with the views already expressed.

[Omitting a minor point.]

The judgment is reversed and the cause remanded.

Reversed and remanded.

Stewart v. International, etc., Railroad Company.

STEWART V. INTERNATIONAL, ETC., RAILROAD COMPANY.

(33 Tex. 289.)

Carrier — negligence — railroad — duty toward passengers alighting at freight depot.

A railway company, inviting a passenger to alight after dark at a freight depot, instead of a regular passenger depot, is bound to keep the platform and approaches in a safe condition for the passenger's reception and egress, and to provide lights if necessary to his safety.*

ACTION for personal injuries by negligence. The opinion states the case. The defendant had judgment below.

Joe. H. Stewart and Fred. Carlton, for appellant.

Peeler & Maxey, for appellee.

GOULD, A. J. The questions presented in this case grow out of the action of the court in sustaining a demurrer to the petition.

The petitioner alleges the purchase by him from defendant of a ticket from Round Rock to Austin, whereby he became entitled to ride on the cars of defendant from Round Rock to Austin on said day (July 2, 1877); that defendant did not leave petitioner at its usual place of stopping in the city of Austin, to wit, at the passenger depot, but at the freight depot. He further alleges:

"That on the arrival of the cars of the defendant as aforesaid at the freight depot aforesaid, petitioner, with numbers of other passengers in the cars of defendant, at the request of the employees of defendant and by their instruction, emerged from the cars of defendant, petitioner supposing and believing that he was at the regular passenger depot of defendant, when in truth and in fact, as before alleged, he was at the freight depot of defendant. And petitioner further alleges, that he was not advised or informed by any agent or employee of defendant that the cars had not stopped and were not then at the regular passenger depot of defendant; that at the time of the arrival of petitioner as aforesaid on the cars of the defendant as aforesaid, it was dark, being about the hour of

* See *Com. v. Boston & Me. Railroad* (120 Mass. 500), ante, 382.

Stewart v. International, etc., Railroad Company.

12:30 A. M.; that the defendant had no lamps in and about its said freight depot, by the light of which petitioner and other passengers in said cars could find their way. That in consequence of the neglect of defendant in not providing lights in and about its said freight depot, and by reason of the darkness then existing, petitioner while moving and walking along the platform of defendant's said freight depot with all usual care and caution of a prudent man, walked and tumbled off the said platform of said defendant, and fell to the ground therefrom a distance of some six feet.

"That by reason of the fall aforesaid caused by the negligence of the defendant aforesaid, and by its failure as aforesaid to land petitioner at the usual and proper place of landing in the city of Austin aforesaid, to wit, at the passenger depot," petitioner sustained serious personal injuries, to his damage \$10,000. It is also alleged "that the defendant was guilty of breach of contract in not complying with its contract to land petitioner at its passenger depot in said city of Austin, and was guilty of neglect and want of proper care in not providing proper lights and accommodations for its passengers at its freight depot as aforesaid, at the date and time last aforesaid, and that all the injuries aforesaid were inflicted upon petitioner by the defendant through its own careless, negligent and wrongful acts."

Upon the defendant's demurrer to the sufficiency of the petition, the following judgment was rendered :

"On this, the 4th day of December, A. D. 1877, came the parties by their attorneys, and then came on to be heard the demurrer to the petitioner, and the arguments of counsel thereon being heard, it is the opinion of the court that as to so much of the plaintiff's petition as seeks to recover from the defendant for alleged injuries to the plaintiff, after he, the said plaintiff, had safely alighted and landed from the cars of the defendant, the law is for the defendant, and the demurrer to that extent sustained ; and on suggestion of attorneys for plaintiff, that plaintiff does not ask or claim from defendant and damages for any thing occurring anterior to the landing of plaintiff from defendant's cars, or for any supposed breach of contract on the part of defendant in not landing plaintiff at the regular passenger depot in the city of Austin, judgment final on demurrer is here rendered for defendant, and the petition dismissed, to which plaintiff excepts and gives notice of appeal to the Supreme Court. It is therefore considered by the court that

Stewart v. International, etc., Railroad Company.

the defendant go hence without day, and that he recover of the plaintiff his costs in this behalf expended, for which he may have execution."

The construction of this judgment claimed by appellee, and some of the legal positions assumed, may be gathered from the following proposition submitted by counsel in support of the action of the court :

When plaintiff safely landed from the cars at the freight depot of defendant, his contractual relations with the defendant as passenger ceased. Under his waiver in the judgment, if he suffered injury subsequently, it was not as a passenger. He must therefore state facts showing that it was necessary or proper for him to be on the platform other than as a passenger; and that as to him particularly, or as a member of the public at large, it was the legal duty of the defendant to have kept lights, and that its failure to discharge this duty was the proximate cause of his stepping off the platform, the proximate cause being a question of law.

The opinion of the court below seems to have been announced that plaintiff could not recover for the alleged injuries received "after he had safely alighted and landed from the cars;" thereupon the plaintiff's attorneys waived his claim for damages for any thing occurring anterior to the landing, or for the breach of contract in failing to land him at the right depot. But we do not understand them as having waived or withdrawn any of the averments of the petition affecting the plaintiff's right to recover as passenger or otherwise, for the personal injuries received from the fall after he had alighted.

The petition was framed to recover as passenger from the carrier, and to abandon his claim in that capacity for damages for injuries received from the fall, by no means follows from his disclaimer as to other damages.

The proposition that the "contractual relations with the defendant as passenger" ceased when he safely alighted from the cars at the freight depot is not believed to be correct. It is the duty of railway companies to provide reasonable accommodations at their stations for passengers who have occasion to travel on their roads. They are under obligation "to keep in a safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort, as well as all portions of their station grounds, reasonably near to the platforms, where passengers,

Houston, etc., Railroad Company v. Willie.

or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go."

The cases are numerous where passengers have recovered for injuries received after alighting from the cars, the railroads having failed to exercise due care in providing means for safe egress. *McDonald v. Chicago & N. W. Ry. Co.*, 26 Iowa, 124; *Patten v. Chicago & N. W. Ry. Co.*, 32 Wis. 533; *Osborne v. Union Ferry Co.*, 53 Barb. 629; *Gaynor v. Old Colony, etc., Ry. Co.*, 100 Mass. 211; *Imhoff v. Chicago, etc.*, 20 Wis. 364; *Columbus & Ind. Ry. Co. v. Farrell*, 31 Ind. 408; *Martin v. G. N. Ry. Co.*, 81 Eng. Com. Law, 179; *Nicholson v. Lancashire & Yorkshire Ry. Co.*, 3 H. & C. 534; *Caterham Ry. Co. v. London R.*, 87 Eng. Com. Law, 410; Shearm. & Redf. on Neg., § 275; Hutchinson on Carriers, § 516 *et seq.*; Redf. on Carr., § 514.

The petition charged the railroad with neglect of duty in not providing "proper lights and accommodations for passengers at its freight depot" at the time, and that plaintiff's fall and injuries were occasioned by that neglect. It is unnecessary to inquire whether the averments would have been sufficient if specially excepted to. On general demurrer the petition was, we think, sufficient. Whether it was, under the circumstances, negligence in the railroad not to provide lights at the freight depot was a question of fact for the jury. The court, by sustaining the demurrer, precluded plaintiff from having that and other questions of fact passed upon by the jury, and in so doing the court erred.

The judgment is reversed and the cause remanded.

Reversed and remanded.

HOUSTON, ETC., RAILROAD COMPANY V. WILLIE

(58 Tex. 318.)

Measure of damages — negligence.

In an action of damages for personal injuries by negligence producing permanent disability, the measure of damages is such an amount as will purchase an annuity equal to the interest on the difference between what the plaintiff could earn before and what he could earn after the injury, and not such a principal sum as would produce such interest

Houston, etc., Railroad Company v. Willie.

ACTION for personal injury by negligence. The opinion states the point. The plaintiff had judgment below.

Hancock, West & North, for appellant.

John W. Robertson, for appellee.

BONNER, A. J. [Omitting other questions.] The third error assigned is, that "the court erred in its charge to the jury on the measure of damages, and also on the liability of the defendant for damages sustained by its employee while in the discharge of his duties to defendant." This alleged error presents two questions relating 1. To the measure of damages. 2. To the liability of the defendant company to the plaintiff as its employee.

First. As to so much of the charge as relates to the measure of damages. The court charged the jury on this question as follows: "The only damages are the actual damages sustained by plaintiff as revealed by the evidence; and the only item of damages upon which there is any evidence is in the inability of plaintiff now to earn or secure wages for his labor such as he was receiving at the time of the injury, and the difference between his ability before the injury and his ability since to earn wages is and must be the basis of computation in case he is entitled to recover. If you find for the plaintiff, find no greater sum than, put at interest at the agreed rate, will produce annually a sum equal to the difference between what plaintiff could earn before and what he can now earn in consequence of the injury."

The latter portion of this charge we think was objectionable, in assuming as a question of law that the jury might, as a legal basis for the measure of damages, find for the plaintiff an amount, the interest upon which would annually produce a sum equal to the difference between what plaintiff could earn before and what he can now earn in consequence of the injury.

If compensation for lessened ability to labor be assumed as the true measure of actual damages, then it would seem that it should not be such sum as would bring an annual interest corresponding with the annual value of this lessened ability, leaving the principal sum still belonging to the estate of plaintiff after his death, although he had then become wholly incapacitated for labor; but would be an amount which would purchase an annuity equal to this inter-

Brennan v. City of Weatherford.

est, during the probable life of the plaintiff, calculated upon a reliable basis of the average duration of human life.

[Omitting the other question.]

Reversed and remanded.

BRENNAN V. CITY OF WEATHERFORD.

(58 Tex. 330.)

Municipal corporation — want of seal — estoppel.

The legislature enacted that a city might abandon its charter and become incorporated under the general law, by a vote of two-thirds of its council, entered in the journal; a copy thereof, under the corporate seal, to be filed in a certain office. Such a vote was passed by the defendant, and the same was entered in the journal; and a copy was filed as required, except that it was not sealed, the defendant having no seal. The defendant had been incorporated for twenty years, and had never had any seal. *Held*, (1) that the provision for the sealing was merely directory; (2) that the defendant was estopped from raising the objection.

THE head-note and opinion show the case. The defendant had judgment below.

P. F. Brennan, for appellant.

Lanham, Roach & Stevenson, and *Jasper N. Haney*, for appellees.

BONNER, A. J. The legal effect of the pleadings of plaintiff was to raise, in a collateral proceeding, the question of the existence in law of the corporation of "the city of Weatherford," its existence in fact being admitted.

There are two questions presented by the record :

1. Could the plaintiffs in their individual names institute this proceeding, or should it have been by information in the nature of a *quo warranto* in the name of the State ?

2. Was a corporate seal to the copy of the proceedings of the city council, adopting the general incorporation act, an essential prerequisite to give vitality to the new corporation ?

[Omitting the discussion of the former.]

This suit should have been brought by information in the nature

Brennan v. City of Weatherford.

of a *quo warranto*, and the special demurrer to this effect was well taken. That the court did not base the judgment upon this ground did not affect its validity.

Second. As to the want of a corporate seal.

Counsel for appellants desire that we pass upon this question also, should our opinion be adverse to the rights of plaintiffs to institute the suit.

As it is not necessary to the decision of the case, it would be improper to do so until the question should have been argued on behalf of the State, were we inclined to the opinion that the want of a corporate seal was necessarily fatal to the existence of the new corporation.

There were two principal objects intended to be provided for by the statute: one, the mode by which the new charter could be accepted by a two-thirds vote of the city council, had at a regular meeting and entered upon the journal of the proceedings; the other, the means by which this vote could be authenticated and placed upon the public records, by a copy of these proceedings signed by the mayor, attested by the city clerk or secretary, under the corporate seal.

Mr. Cooley sums up, as the general result of the cases, which discriminate between statutes which are mandatory and those which are directory only, that "those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute." Cooley Const. Lim. 77.

A more liberal rule of construction is allowed in favor of public charters granted for the general good than in private charters for individual gain. *Bradley v. R. R. Co.*, 21 Conn. 306.

We think that the controlling prerequisite of the statute for the acceptance of the new charter was the two-thirds vote of the city council, and that the legislature did not intend, in a case like the one now before the court, that the attestation by the corporate seal should be an absolutely essential prerequisite to the existence of the new corporation.

Eicks v. Copeland.

It is affirmatively shown by the petition that the old corporation had existed for about twenty years; that it had no seal, and consequently could not by that means have authenticated its former proceedings, and the presumption is that they had been authenticated as in this instance. The city of Weatherford was by its acts estopped from denying its corporate existence, and it is believed that the plaintiffs, as part of the individual members composing this corporation, are likewise estopped in a mere collateral proceeding.

The reasons which anciently required the formality of a seal have to a great extent ceased to exist, and with this, under modern decisions, much of that sanctity which once attached to them.

We are of opinion that there should be a broad distinction between those cases in which parties are held to answer *in invitum* by legal process, in which a seal of a certain character established by law is made an essential requisite to the validity of official proceedings, and those in which a mere private seal, fashioned after the peculiar fancy of an individual or corporation, is used for private purposes.

Affirmed.

EICKS V. COPELAND.

(53 Tex. 581.)

Assignment for benefit of creditors — authority to sell on credit — to retain assets until entire conversion.

An assignment for the benefit of creditors directed the trustee, "when he shall have realized cash from said assets, in such sums as he may deem proper, that he pay out the same *pro rata* to the said creditors by installments or dividends, or he may retain the same until all the assets are converted, then pay out the whole, and close up the entire matter at once." *Held*, not conclusively void.

THE opinion states the case.

Tignal W. Jones, for appellants.

W. S. Herendon, for appellee.

BONNER, A. J. The deed of assignment under which appellee

Eicks v. Copeland.

Copeland, plaintiff below, claimed the property in controversy, was made part of his petition.

Appellants Eicks & Co., defendants below, contend that this deed was void upon its face by reason of the following clause: "And my said trustee is hereby directed, when he shall have realized cash from said assets in such sums as he may deem proper, that he pay out the same *pro rata* to the said creditors by installments or dividends, or he may retain the same until all the assets are converted, then pay out the whole and close up the entire matter at once."

Appellants assign as error the refusal of the court below, under their demurrer, to decide as a question of law that the deed was void. The same question was also raised by their objection to its introduction in evidence.

1. It should be borne in mind in the examination of many of the decisions from other States upon the question of fraudulent conveyances, that they were rendered in suits in equity, in which the whole case, both upon the law and the facts, was tried before a chancellor without a jury.

It has been repeatedly decided by this court, that where a debtor, by written instrument, has conveyed or incumbered his property, and the same is sought to be avoided by a creditor because made in fraud of his rights, if there is apparent upon the face of the instrument, by its express terms, or as the indisputable legal presumption therefrom, either such actual fraud in fact or such constructive fraud in law as should avoid it, then it is the duty of the court to so construe the instrument and declare its legal effect; otherwise it is a question of intention to be decided by the jury. *Baldwin v. Peet*, 22 Tex. 708; *Bailey v. Mills*, 27 id. 434; *Van Hook v. Walton*, 28 id. 59; *Peiser v. Peticolas*, 50 id. 638; s. c., 32 Am. Rep. 621; *Crow v. R. R. Co. Bank*, 52 Tex. 362; *Scott v. Alford*, 53 id. 82.

We are of opinion that the clause under consideration is not of itself necessarily so inconsistent with fair dealing and the just rights of creditors as to constitute such fraud *per se* as would have authorized the court, as to them, to declare the deed null and void; and hence that the court did not err in overruling the demurrer to the petition, or in permitting the deed to be read in evidence.

That the assignee had the right to sell for cash or on a credit was but a badge of fraud. *Baldwin v. Peet*, 22 Tex. 708.

It might in many cases be both expensive and quite inconvenient

Eicks v. Copeland.

to require an assignee to distribute among several creditors the proceeds of the sales of such articles as are embraced in this assignment, as they might come into his hands from time to time, and often, when the property would be insufficient to pay in full the claims, he could not until all the assets had been converted into money, and the costs and expenses paid, determine without risk the proper *pro rata* to each creditor. In some cases the assets might readily be converted into money, and final distribution made at an early day; in others it might be necessarily longer delayed. Hence, under the circumstances of this particular case, a sound discretion might often well be confided to the assignee, either to pay in installments or to await until ready for final distribution. Although any improper delay on the part of the assignee might render him liable in damages, or subject him to removal at the suit of the creditors, it would not follow that in this possible dereliction of duty the deed itself would be void. Burrill on Assignments, § 214. The limitation upon the discretion of the assignee in this case is quite different from that in *D'Invernois v. Leavitt*, 23 Barb. 80, relied on by counsel for appellants, which gave the assignee the right to withhold the distribution, not until the assets were converted into money, but for any length of time which he in his discretion might think proper. This case would also be very different had the property been conveyed to Copeland absolutely, ostensibly for his own use and benefit, and he was withholding its sale or the collection of the proceeds for the benefit of Chiles and in fraud of his creditors.

As presented however, Chiles, so far from being benefited, would be injured by delay upon the part of Copeland, as in the meanwhile interest would be running against him, and the assets which he had set apart for the payment of his indebtedness be subject to waste.

[Omitting other considerations.]

Affirmed.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA.

GILLISON V. CITY OF CHARLESTON.

(16 W. Va. 282.)

Municipal corporation — negligence — surface water.

Where a city, in grading streets, collects surface-water and casts it in a new body on the land of an adjoining proprietor, it is liable for the injury.*

ACTION for negligence. The opinion states the case. The plaintiff had judgment below.

Mollohon & Nash and Smith & Knight, for plaintiff in error.

William A. Quarrier, for defendant in error.

JOHNSON, J. The first question to be determined in this case is: Was the demurrer to the plaintiff's declaration properly overruled?

Two grounds of demurrer are insisted upon; first, that the declaration does not show a cause of action, because it claims damages against the defendant, the city of Charleston, "for drainage of surface-water upon the lot of the plaintiff by a municipal corporation in the construction of its ditches and drains;" and secondly, that

* See *Neenan v. City of Albany* (79 N. Y. 470), 35 Am. Rep. 540, and note, 548.

“the declaration does not show possession in the plaintiff at the time the alleged trespass was committed.”

To sustain the first ground of demurrer the defendant's counsel cites *Wilson v. Mayor, etc., of New York*, 1 Den. 595; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Greely v. Maine Cent. R. R. Co.*, 53 Me. 200; *Flagg v. City of Worcester*, 13 Gray, 601; *Roll v. City of Augusta*, 34 Ga. 326; *Clark v. City of Wilmington*, 5 Harr. 243; *Carr v. Northern Liberties*, 35 Penn. St. 328; *City of Atchison v. Challis*, 9 Kans. 603. I will review these authorities and some others, to see what they decide; and then inquire whether they correctly propound the law.

In *Wilson v. Mayor*, the plaintiff declared in case against the city, alleging that “she owned and was possessed of a house and four lots of ground at the north-west corner of Fortieth street and Seventh avenue, in the city of New York, and that the defendant had so carelessly, etc., raised, graded and made the said avenue and street, as to obstruct the flowing of the water from her premises, and that the raising of the street and avenue by the defendant had turned the water and caused it to run upon her premises, the defendant having omitted to construct or make any sewer, gutter or drain from the premises or along the street or avenue, as it was its duty to do, and as it was bound by law to have done.” It was proved upon the trial, that the plaintiff owned the premises, and that in the fall of 1842 the defendant graded Fortieth street and Seventh avenue on part of the plaintiff's premises, raising the same about eighteen inches without making any drain or sewer, thereby obstructing the former flow of water from the plaintiff's lots, so that the water ran from the street and avenue, and from the adjacent lots upon the premises, and that it stood there several months, from the autumn of 1842 until the ensuing spring. In the spring of 1843 the defendant made a sluice in Fortieth street, by means of which the water passed off from the plaintiff's premises. The proceedings of the defendant in raising and grading the streets referred to were admitted to be regular.

The defendant's counsel moved for a nonsuit, insisting that the action as laid and proved could not be sustained. The motion was granted, and the plaintiff excepted. The Supreme Court affirmed the judgment, holding that the action could not be sustained; and held, that “where a duty, judicial in its nature, is imposed upon a public officer, or a municipal corporation, a private action will not

Gillison v. City of Charleston.

lie for misconduct or delinquency in its performance, even if corrupt motives are charged." BEARDSLEY, J., in delivering the opinion of the court, said: "It was conceded on the trial of the cause, that the proceedings for these purposes had been regular. What was done, it was therefore lawful to do; and if the plaintiff was thereby incommoded, it was *damnum absque injuria*, and gave her no right of action against those who had only exercised a legal power vested in them for the public convenience and welfare."

Mills v. City of Brooklyn, was an action for damages. The complaint alleged, that the plaintiffs were the owners of a lot with a brick dwelling-house thereon; and that the defendant had the care of the streets and avenues and the control of the widening, sewerage and draining of said streets; and that the defendant so negligently and unskillfully built sewers, where this property was situated, that said sewers had been insufficient to carry off the water brought there by the grade of the streets, and that by reason thereof the plaintiff's lot and house had been repeatedly flooded, etc. The plaintiff recovered a judgment for \$900 damages. The Court of Appeals reversed the judgment, and held: "A municipal corporation is not liable to a private action for damages accruing, for not providing sufficient sewerage for draining the plaintiff's premises. The duty of draining the streets, etc., of a city, although not a judicial one, is of a judicial nature requiring the exercise of qualities of deliberation and judgment. Where the authorities of a city caused a sewer to be constructed for a locality which included the plaintiff's premises, but which, though not in itself a nuisance, was insufficient to carry off the water, the city corporation was not responsible for plaintiff's damage occasioned by the overflowing."

In *Greely v. Maine Central R. R. Co.*, it was held, that "no action lies for the turning of mere surface-water from one's own land upon the land of another."

In *Flagg v. Worcester*, the action was for tort. The declaration contained two counts, in the first the plaintiff complained that his estate, abutting on Bowdoin street opposite Chestnut street, had been injured by the water accumulated on these streets, for which the defendant neglected to provide proper and suitable drainage, and instead of doing so suffered and permitted it to escape and flow from Bowdoin street upon and across his land.

MERRICK, J., said: "It is not alleged in the declaration, nor was any attempt made upon the trial to show, that Bowdoin and Chest-

nut streets were not in all respects, except in relation to the alleged deficiency in proper and suitable drainage, made, graded and finished, so as to be safe and convenient for public use. The defendants therefore are not liable upon the case stated and proved by the plaintiff to compensate him for his alleged damage, unless all towns and cities are not only by law required in the construction and maintenance of public highways, to provide such sufficient drainage for all surface-water, that is, all such as is accumulated by the falling of rain or the melting of snow, as will prevent it from thence flowing upon and injuring any contiguous estate ; but are also exposed to an action for all injuries which may thereby be occasioned." The court held, "that no action lies against a city for the injury occasioned to land, bounding on a public street, from the accumulation of water on the surface of the street which the city has neglected to drain."

In *Roll v. City of Augusta*, the complaint against the city was for permitting the South Carolina Railroad Company to construct and use a railroad track along Washington street and Reynolds street, that these tracks elevated the streets, or parts of them, so that the water was caused to flow upon the plaintiff's premises, and into his house, injuring his materials, stock in trade, and his house and buildings, that no adequate drainage was provided, etc. The damage was alleged to amount to \$24,000. The court, on motion of the defendant, after hearing the evidence for plaintiff, ordered a nonsuit, to which judgment a writ of error was awarded.

The court affirmed the judgment on the authority of *Mayor and Council of Rome v. Omberg*, 28 Ga. 46, in which the court held, "that where the corporation of the city of Rome in grading a street dug so near the lot of the plaintiff that the earth which supported it crumbled away and the fence fell, no action could be maintained against the mayor and council for this injury."

In *Clark v. City of Wilmington*, it was held that "the city corporation in lawfully grading and opening streets, according to the city plan, is not liable for damages by draining the water on adjacent lots, except in case of obstructing a natural stream." In this case the action was for injury done by the grading and extension of Fifth and Spruce streets, by which the plaintiff's cellar was flooded, his goods damaged and the health of his family impaired. The grading of the streets raised them several feet above the natural level of the ground, and caused a pond of water to collect in the lot opposite

to the plaintiff's premises, which was a very offensive nuisance, and which, it was alleged, penetrated through the street and ran into his cellar.

In *Carr v. Northern Liberties*, the action was to recover damages by reason of the flooding of plaintiffs' premises, in consequence of the neglect of the defendants to provide sufficient inlets to their culverts to carry off the water at the point where the plaintiff's property was situated, and in consequence of the improper, unskillful and insufficient manner in which the said culvert was originally constructed, and the negligent manner in which it was subsequently kept. The court held, that "an action will not lie against a municipal corporation for neglecting to construct a proper system of drainage, in consequence of which a citizen's store was overflowed from an extraordinary fall of rain, and a stock of goods therein was damaged;" that "a power to construct sewers, given to a municipal corporation by statutes, does not impose upon the corporate authorities an obligation to exercise the power conferred; that "a municipality having power to grade its streets is not responsible in damages for any injury sustained by a citizen in consequence of the particular grade adopted. Nor is it liable for neglecting to provide a sufficient number of inlets to its sewers, which were sufficient when constructed, but have ceased to be so in consequence of the increase of population, and the greater extent of territory graded and built upon."

City of Atchison v. Challiss was an action for damage to goods, caused by the accumulation of surface-water in the cellar where they were placed by the plaintiffs below. The complaint was, that the sewer was insufficient to carry off the water, and that the same had not been kept in repair and unobstructed. The court held, that "where the city constructs a sewer or drain for the purpose of carrying off surface-water, it is not bound to construct such a sewer or drain as will be sufficient to carry off all the surface-water in all cases and under all circumstances. After a city has constructed a sewer or drain for the purpose of carrying off surface-water, it may in its discretion wholly abandon or discontinue the same, and never make any further use of it; and where the city does not leave individuals in any worse condition by such abandonment or discontinuance than they would be if such sewer or drain had never been made, the city will not be liable for any injury to individuals caused by the flow of surface-water."

In *City of Bangor v. Lansil*, 51 Me. 521, it was held, that "the owner of land has the legal right to fill it up so as to interrupt the flow of surface-water over, whether flowing from a highway or any adjoining land. Nor does the fact that the land filled up was a swale make any difference in the owner's rights, provided no natural water-course is obstructed. If in filling up his lot the owner construct a drain for the flow of surface-water from the highway, which had been accustomed to flow across his lot, and afterward allow the drain to become obstructed, and it is repaired by the town, the latter can maintain no action to recover the expense of such repairs."

In *Parks v. City of Newburyport*, 10 Gray, 28, the declaration alleged, that "there ever had been a passage for water over the land of the defendants which the plaintiff had a right to have open, and that the defendants within one year of the date of the writ had obstructed said passage-way so as to turn the water upon the plaintiff's land, by reason whereof the plaintiff's well was destroyed." The court held that the action would not lie, for the interruption of mere surface drainings, and cited *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Ashley v. Walcott*, 11 id. 192.

In *Gannon v. Hargadon*, 10 Allen, 106, it was held, that "the owner of land may lawfully occupy and improve it in such manner as either to prevent surface-water, which accumulates elsewhere, from coming upon it, or altering the course of surface-water, which has accumulated thereon or come upon it from elsewhere, although the water is thereby made to flow upon the adjoining land of another to his loss." The same principle is recognized in *Inhabitants of Franklin v. Fisk*, 13 Allen, 211.

In *Grant v. Allen*, 41 Conn. 156, it was held, that "a person has no right without permission to go upon his neighbor's land, from which surface-water flows upon his own, and put earth upon it, or dig the soil for the purpose of turning the flow of the water from his own land. And it is no justification of the act that the flow of water is endangering the wall of his house, and that he has given notice to the owner of the adjoining lot, and the latter has neglected to take any action."

In *Bowlsby v. Speer*, 31 N. J. 351, it was held, that "no legal right of any kind can be claimed *jure naturæ*, in the flow of surface-water, so that neither its retention, diversion or repulsion is an actionable injury, even though damage ensue." In that case the

defendant was the owner of land situate on a hill-side, below which were the premises of the plaintiff. Above the defendant's land was a pond occasioned and fed exclusively by rain-water. In times of rain this pond ran over and with other surface-water ran down and escaped through a hollow on defendant's land. The defendant erected a stable on his land over this hollow, and thereby caused a portion of said surface-water to run on to the land of the plaintiff. "*Held*, such act of the defendant was not actionable."

I propose now to examine a number of authorities not in harmony with those we have cited, but recognizing contrary principles.

In *Adams v. Walker*, 34 Conn. 466, the action was for causing an injury by turning the surface-water, which accumulated on the defendant's lot from rains and melting snow, upon the adjoining lot of the plaintiff. The defendant claimed the right to grade his own lot as he pleased, and that if he did this for any lawful purpose of his own, as to prevent the surface-water from flowing into his well, and had no malicious intention to injure the plaintiff, he was not liable for any injury resulting consequently therefrom by the surface-water being turned by such grading directly upon the plaintiff's lot where it had not previously flowed. HINMAN, C. J., delivering the opinion of the court, said: "The claim is briefly this, that the defendant might lawfully so grade his own lot as to turn the surface-water, which incommoded him, upon the plaintiff's lot to his injury, if he had no malicious motive, and was seeking only his own benefit. And we think the court was understood by the jury as sanctioning this claim in that part of the charge where they were told, that if they should find that the defendant in grading his lot formed a basin thereon, and that he did this merely to prevent the surface-water from running into his well, or doing other damage to his premises, and if in consequence of such grading and the forming of such basin the water passed from the defendant's land upon the land of the plaintiff in greater quantities and in different places than it had done before, the defendant is not liable therefor.

"The court undoubtedly did not mean to be understood as instructing the jury, that a party might lawfully turn the surface-water which was inconvenient to himself directly upon his neighbor's lot, yet we think this is the purport of this part of the charge. The grading of this lot is spoken of as having been done for the

mere purpose of preventing his surface-water from running into his well, or doing other damage to his premises. There was surface-water on his lot which injured his well, and to get rid of it, he so graded his land as to throw the water upon the land of the plaintiff; and the jury was in substance told that for the injury thus caused no action would lie, unless there was an express intention to injure the plaintiff. As thus understood the charge is in conflict with the doctrine, that a party has no right to discharge the rain-water falling upon his land, or upon the roofs of his buildings, upon the land of his neighbor.

"It of course is immaterial whether the water is turned upon another's land by means of a spout or trough projecting from the roof of a building, or whether it is led there by a gutter or ditch, or turned upon it by means of an embankment upon the side of a hill. The effect is the same, in turning the water from its natural course upon another's land, and the injury to the party, upon whose land it is turned, is the same in either case."

A new trial was granted. The syllabus of the case is: "A person has no right by grading the surface of his land, to turn the surface-water, which ordinarily falls upon or flows over it, upon the adjoining land of another. And it makes no difference that he does it for the purpose of preventing the water from flowing into his well, or for other lawful purpose, and with no intention to injure the adjoining owner."

The court in this last case cites no authority. The case is readily distinguishable from *Grant v. Allen, supra*, 41 Conn. 156, and is not overruled by it, as the latter case only decided, that "a person has no right without permission to go upon his neighbor's land, from which surface-water flows upon his own, and put earth upon it, or dig the soil, for the purpose of turning the flow of the water from his own land."

In *Mayor, etc., of City of New York v. Furze*, 3 Hill, 612, it was held, that "the corporation of the city of New York are bound to repair the sewers, etc., constructed by them; and if an inhabitant be injured by reason of their neglect in this particular, he may maintain an action against them for his damages." The declaration alleged, that the plaintiff was the owner and occupant of a building situated upon Pearl street in said city, where he carried on the business of a "baker and confectioner;" that there were certain basins, culverts and sewers in said street, designed for con-

Gillison v. City of Charleston.

ducting and carrying off the water running in and upon the same, which it was the duty of the city to keep in proper condition and repair; that said basins, culverts and sewers became filled up and obstructed, so that they could not carry off the water, etc., and the defendant refused and neglected to remove said obstructions and keep said basins, etc., in proper condition and repair, whereby the premises of the plaintiff were overflowed, and his building, fixtures, etc., with a large quantity of flour, sugar, etc., upon the premises were damaged, etc. The plaintiff recovered a judgment for \$750, which judgment was affirmed.

In *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, it was said that "a municipal corporation in the construction of its sewers, drains, etc., is bound to exercise that care and prudence which a discreet and cautious individual would use, if the whole loss or risk were to be his own," that "where a duty of a judicial nature is imposed upon a public body, the members of the body, it seems, are exempt from responsibility by civil action for the manner in which the duty is performed;" * * * "but where a duty purely ministerial is violated, or negligently performed, by a public officer or body, an injured party may have redress by action," * * * that "an ordinance of a city corporation directing the construction of a work within the general scope of its powers is a judicial act, for which the corporation is not responsible; but the prosecution of the work is ministerial in its character, and the corporation must therefore see that it is done in a safe and skillful manner." To the same effect is *Barton v. City of Syracuse*, 36 N. Y. 54, where it is held, that "in the construction of sewers and keeping them in repair, municipal corporations act ministerially, and are bound to exercise needful diligence, prudence and care."

In *Rhodes v. City of Cleveland*, 10 Ohio, 159, the suit was an action on the case for cutting ditches and water-courses in such a manner as to cause the water to overflow and wash away the plaintiff's land. The court below charged the jury, that "the plaintiff could not sustain the action, unless he showed them that the city acted illegally, or if within the scope of authority, that it acted maliciously." Under this charge the jury found for the defendant. Upon the hearing of the writ of error LANE, C. J., said: "That the rights of one should be so used as not to impair the rights of another is a principle of morals, which from very remote ages has been recognized as a maxim of law. If an

individual exercising his lawful powers commit an injury, the action on the case is the familiar remedy. If a corporation acting within the scope of its authority should work wrong to another, the same principle of ethics demands of it to repair the wrong; and no reason occurs to the court why the same remedy should not be applied to compel justice from it. * * * It does not appear to me a sufficient reason against sustaining this suit, that in other States the remedy is not extended so far. But no decision of our own State goes to deny the right to the present action. In the two cases reported in 4 Ohio, 500, 514, we held the corporation of Cincinnati liable for injury done by grading, either illegally or maliciously. This was regarded as carrying the law beyond decided cases. In *Scovil v. Geddings*, 7 Ohio, 562, we held the agents of the trustees of the town not liable, because they were acting within their jurisdiction. In *Hickox v. City of Cleveland*, 8 Ohio, 544, we held the city not liable by action for an injury by grading, because the statute conferring the power prescribed a form of assessing damages, by which compensation might be made. Upon the whole we believe that justice and good morals require that a corporation should repair a consequential injury, which ensues from the exercise of its functions, and that if we go further than adjudicated cases have yet gone, we do not transcend the line, to which we are conducted by acknowledged principles." The court held, that "corporations are liable like individuals for injuries done, although the act was not beyond their lawful powers."

In *Tootle v. Clifton*, 22 Ohio St. 247; s. c., 10 Am. Rep. 732, it was held, that "the erection of an embankment upon one's own land, whereby the surface-water on the adjoining land of another is prevented from flowing in its natural course, and caused to flow off in a different direction over the land of the latter, is a nuisance, for which an action may be maintained without showing actual damage, and for which nominal damages at least may be recovered." WELCH, C. J., in delivering the opinion of the court said: "Every act of preventing the water flowing from another's land in its natural channels, and causing it to flow over his land without his consent, is an invasion of his rights and therefore actionable."

In *Thurston v. City of St. Joseph*, 51 Mo. 510; s. c., 11 Am. Rep. 463, the gravamen of the complaint was, that through negligence in the construction of a sewer, water was thrown on the lot of the plaintiff, and thereby her property was injured. The court held,

Gillison v. City of Charleston.

that "the work of constructing sewers is ministerial in its character; and when a corporation undertakes this work, it is responsible in a civil action for damages caused by the careless or unskillful performance of the work. So it is the duty of corporations to keep sewers in repair, and if they are negligently permitted to become obstructed or filled up, so as to cause the water to backflow and do injury, there is a liability on the part of the corporation having control over them."

In *City of Logansport v. Wright*, 25 Ind. 512, it was held, that "an ordinance of a municipal corporation directing the construction of a work within the general scope of its power is a judicial act, for which the corporation is not responsible; but the execution of the work is a ministerial act, and the corporation is responsible that it be done in a safe and skillful manner."

In *City of Indianapolis v. Huffer*, 30 Ind. 235, the action was to recover damages resulting from an overflow of the plaintiff's lot and dwelling thereon by water, caused by an insufficient and carelessly constructed sewer erected by the city. The court held, that "an incorporated city is not ordinarily liable for consequential injuries to private property, resulting from the grading and improvement of its streets, if in making such improvements reasonable skill and care be used to avoid the injuries. The skill and care, which is incumbent, relates as well to the plan, as to the execution of the work — in the case of a sewer, to its capacity, as well as to the mechanism in construction."

In *Ellis v. Iowa City*, 29 Iowa, 229 the plaintiff claimed that the city negligently and unskillfully built the gutter of a street in front of her lots, so that the basement of her house was flooded, and damage was done to the house, furniture, etc. The street had been graded before the level of the plaintiff's lots in accordance with the grade established by the city; and provision was made to carry off the water that would flow along the street by gutters. The plaintiff claimed that the water overflowed from the gutter and her lots were flooded in consequence. The judgment of the court below was for plaintiff and was affirmed. The Supreme Court held that "if a city in grading its streets causes the work to be done in a careful and skillful manner, it will not be liable to injury to property resulting therefrom; if on the other hand the work is done in an unskillful manner, it will be liable for such injuries. It was accordingly held, that if the city in filling a street to bring it up to the

established grade, whereby it was raised above the lots of the plaintiff, constructed unskillful and insufficient gutters, by reason of which the water was caused to flow from the street on to the premises of plaintiff, it would be liable for injuries to the property resulting therefrom."

In *Nevins v. City of Peoria*, 41 Ill. 502, it appeared that the city caused the grade of a part of Main street running along the bluff to be raised, and caused other work to be done for the purpose of directing the flow of water from the west side of Main street, which was its natural channel, to the east side and through a new channel to the river, thus improving the drainage. The appellant had at that time a water-cure establishment in operation on the east side of Main street; and he claimed that the work undertaken by the city was badly and carelessly done, and never completed, and that in consequence thereof his house and grounds were flooded at any considerable rain with mud and water, and that a stagnant pond covering from one to two acres was formed within a short distance from his house, rendering it unhealthy and ruining his business. The court held that a city has no more power over its streets than a private individual has over his own land; and it cannot under the plea of public convenience be permitted to exercise that dominion to the injury of another's property in a mode that would render a private individual responsible in damages without being responsible itself. The same law that protects the right of property of one private individual against invasion of other individuals must protect it from similar aggressions on the part of municipal corporations. A city may elevate or depress its streets as it thinks proper, but if in so doing it turns a stream of mud and water upon the grounds and into the cellars of one of its citizens, or creates in his neighborhood a stagnant pond that brings disease upon his household, it should not be excused from paying for the injuries it has directly wrought.

In *City of Aurora v. Gillett*, 56 Ill. 132, the action was case to recover damages resulting from the flooding of the basement of the Aurora House in said city occupied by the plaintiffs, the flooding occurring, as was alleged, by reason of the gutters on both sides of Main street being filled up, and being otherwise defective. The case of *Nevins v. City of Peoria*, *supra*, was approved and the same principles again laid down.

In *City of Aurora v. Reed*, 57 Ill. 30; s. c., 11 Am. Rep. 1, it

Gillison v. City of Charleston.

was held, that "where the city through its proper officer fixes the grade of a street, and property owners improve the street under the direction of the officer, and the improvement of the street is so made that water from rains and melting snow runs to and discharges itself over a lot owned by an individual, the city is liable for damages. The city has no right to turn surface-water on private property, nor does it change the principle, that the street was improved before the lot was. Nor does it change the liability of the city by showing that other property owners on the street filled up a portion thereof in front of their lots, so as to turn the water on plaintiff's house. If the officials of a city permit persons to place obstructions in the streets, the city will be liable for injury resulting therefrom. It is no defense to show that plaintiff might have dug ditches that would have protected his property. He was under no legal obligation to do so; and the city was. It was the duty of the city to provide proper sewerage to carry off such water. It is armed with ample power to provide proper means therefor; if necessary, it could condemn ground for the construction of sewers, or use the streets therefor as far as practicable." To the same effect is *City of Alton v. Hope*, 68 Ill. 167.

In *Pettigrew v. Village of Evansville*, 25 Wis. 223; s. c., 3 Am. Rep. 50, it was held, that "the owner of land on which there is a pond or reservoir of surface water, cannot lawfully discharge it through an artificial channel directly upon the land of another greatly to his injury. A municipal corporation has no greater power than natural persons in this respect except through an exercise of the right of eminent domain. The fact, that such artificial channel does not extend entirely to the other party's land, will not affect the question." These principles were announced through DIXON, C. J. In the opinion he attempts to reconcile some of the Massachusetts decisions with those principles; but I do not think they can be reconciled in any way. In some States in the east municipal corporations are not held responsible for the manner of disposing of surface-water, no matter how injurious to the property of the citizen. In the west such corporations are held responsible for such injuries, as we have seen by a review of the authorities.

In *Ashley v. City of Port Huron*, 35 Mich. 296; s. c., 24 Am. Rep. 552, the action was instituted to recover damages for an injury caused to the house of the plaintiff by the cutting of a sewer under the direction of the city authorities and under city legisla-

tion, the validity of which was not questioned. The necessary result of cutting the sewer, the plaintiff claimed, was to collect and throw large quantities of water upon his premises, which otherwise would not have flowed upon them. The court held, that "a city is held liable for injury to plaintiff's house, resulting from the cutting of a sewer by the city authorities in such a manner as to cause the collection of large quantities of water, which otherwise would not have flowed there, and which were thereby thrown upon his premises. Such an invasion of another's premises is a trespass, as much as would be the sending of people there with picks and spades to cut a street through them." COOLEY, C. J., in delivering the opinion of the court said: "It is manifest from the authorities, that they recognize in municipal authorities no exemption from responsibility, where the injury an individual has received is a direct injury, accomplished by a corporate act, which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it, without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances, than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding would be a necessary result. The one is no more unjustifiable than the other, and no more an actionable wrong than the other. Each is a trespass; and in each instance the city exceeds its lawful jurisdiction. A municipal charter never gives, and never could give, authority to appropriate the freehold of a citizen without compensation, whether it be done by an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property-right is appropriated in the one case as much as in the other."

Judge Cooley in his recent and most excellent work on Torts, page 580, after reviewing the authorities on this subject, comes to the following conclusion: "Where the surface-waters are collected and cast in a body upon the proprietor below, unless into a natural water-course, the lower proprietor sustains a legal injury and may have his action therefor." He says this is the rule that has been applied to municipal corporations; and he further says of municipal corporations: "While they are not bound to construct sewers or drains to protect adjoining owners against the flow of surface-

water from the public ways, yet if they actually construct such as must carry water upon adjacent lands, they are liable, as much as they would be if they had invaded such lands by sending in their servants or otherwise." We think Judge Cooley reached a sound and just conclusion.

A number of the authorities we have cited recognize the principle that individuals and municipal corporations have the right to dispose of surface-water in any manner they please, to prevent its flow from adjoining lands upon their premises, although the result may be to flood the adjoining land, or to expel it, throw it upon the lands of their neighbors, and in either case are not liable to an action. These cases seem to lose sight entirely of the wholesome principle of ethics as well as law, that a man may use his own property in any manner he pleases, provided he does not thereby interfere with the rights of his neighbor. Some of the authorities seem to regard a municipal corporation as a little monarchy acting for the public good, and absolutely without any responsibility for injuries inflicted upon individuals in case of raising or depressing the grade of the streets and thereby changing the natural course of the surface-water; and if by means of its improvements it throws it upon the adjacent property-holder to his great detriment and loss, and he complains, the answer is: "*salus populi est suprema lex*;" and if he still insists that he has been greatly injured and ought to be compensated, the final and crushing answer is: "*damnum absque injuria*," and the poor sufferer, thinking the law is against him, submits with the best grace he can. I see no reason why a municipal corporation should be exempt from liability, where it commits an act in the nature of a trespass to the injury of a citizen in carrying on its works of improvement, even though it has the right to grade its streets in such manner as it determines.

It is not necessary to determine in this case whether the municipal corporation would be liable for injuries done to the property of citizens while grading the streets, if such grade had been established by the city, and the work was executed with skill and care according to the plan so adopted; but where a city in grading its streets by cutting ditches and drains collects surface-water, and casts it in a body upon the lot or ground of the proprietor below, unless it is so cast into a natural water-course, the proprietor sustains a legal injury and may have his action therefor.

The allegation in the declaration in this case is, that the city of

Charleston "did negligently, carelessly, wantonly, and improvidently, cut and dig sundry superficial water-drains or sluices in the neighborhood of said property, to wit : on Morris and Brooks streets, within the corporate limits aforesaid, whereby and for that purpose the surface-water in large quantities for the distance of one mile, or thereabouts, above the said corporate limits and dwelling and lot, and for a great distance in front and rear of said dwelling and lot, within said corporate limits, and which said surface-water had theretofore passed through the said city by the natural drainage aforesaid, and without approaching or in any manner injuring the plaintiff's said property, was and is conducted to and concentrated upon the said lot and garden of the plaintiff, and in such quantity as to inundate the same, or a large portion thereof, and of some of the adjoining lots, to the depth of about six feet, and covering about four acres of the said lots, the said defendant having failed to make or provide adequate means to drain or carry off the said surface-water, so wantonly and improvidently conducted to and concentrated upon the plaintiff's property, as aforesaid, whereby and by means whereof, etc."

This allegation certainly shows a cause of action against the city. It was the duty of the city in making its improvements upon the streets to use such skill that the improvements so made should not change the course of the surface-water in such manner as to materially injure the property adjoining thereto. The city is armed with full power to do this, and if it fails in such cases to provide proper drainage, it is answerable for the damage it does such property-holders.

[But on another ground]

Judgment reversed, cause remanded.

The other judges concurred.

Johnson v. City of Parkersburg.

JOHNSON V. CITY OF PARKERSBURG.

(16 W. Va. 402.)

Constitutional law — damage to private property for public use — execution of provision.

Where a city in changing the grade of streets permanently injures private property, and thus infringes the explicit provision of the bill of rights, that private property shall not be taken or damaged for public use without compensation, an action lies for the injury, although no statute has ever been enacted for the enforcement of this constitutional provision.

ACTION for damages to real property. The opinion shows the point. The plaintiff had judgment below.

B. M. Ambler, for plaintiff in error.

J. G. McCluer, for defendant in error.

JOHNSON, J. Independent of the statute set out in the declaration, does the plaintiff in his declaration set up a cause of action. Hard as it seems, the sweeping current of both English and American decisions, wholly unbroken except by the Supreme Court of Ohio, is that at common law a municipal corporation is not liable for consequential damages arising from a change in the grade of a street, to one whose land is not taken, although his improvement has been made on his lot in conformity to a former grade; that the municipal corporation, as trustee for the public, has the right to change the grade of the streets whenever in its opinion the public good requires it and if the owners of adjoining property are injured by raising or depressing the street, no action lies against the corporation; it is *damnum absque injuria*. It is unnecessary to cite the authorities upon this proposition. For a collection of them see Cooley Const. Lim. 542 and notes.

Cases have sometimes arisen, in which it was a nice question whether the injury done to the property was not of such a character as to constitute a "taking" thereof. In the cases of *Pumpelly v. Green Bay Co.*, 13 Wall. 180, and *Eaton v. P. R. Co.*, 51 N. H. 504; s. c., 12 Am. Rep. 147, plaintiffs' lands were flooded in such a way as to make them worthless to the owners, the injury being

Johnson v. City of Parkersburg.

permanent; and the courts held that in these cases the lands were taken. Many cases have arisen where under the common law it was held that municipal corporations were liable for throwing surface-water on adjoining lots while grading their streets. See a review of the cases on this subject in *Gillison v. City of Charleston*, *supra*.^{*} But there is a large class of cases like the case before us, where it has been uniformly held at common law, that the plaintiff had no right of action. Judges have frequently regretted that the law was so laid down, and have pointed out the remedy for the injustice, but under the common law were themselves powerless to prevent it.

PARKER, C. J, in *Callender v. Marsh*, 1 Pick. 433, said: "Cases apparently hard will occur; the present is such a one. The plaintiff's house has been standing twenty years, and he had reason to expect that in any contemplated improvement in the streets his liability to expense would have been attended to by the city authorities. * * * If the reducing or raising of streets, which have been laid out for a definite number of years, and on which houses have been erected, should be made a matter of adjudication like that of altering, widening or turning a street, subject to the same provision for damages, the mischief would be cured; for although theoretically all this may be considered as determined, when the street is originally laid out, yet practically there may be cases, where this just provision has been overlooked. * * * That it might be proper for the legislature by some general act to provide, that losses of the kind complained of in this suit should be compensated by the town or city within which improvements may be made for the public good, or by the owner of land which may be particularly benefited, is not for us to deny, but without such legislative provision we have no authority upon the subject, it being clear that by the common law, as well as by our statutes, the defendant in this action is not liable to damages. In no case can a person be liable to an action as for a tort for an act which he is authorized by law to do; and as the statute authorizes surveyors to amend roads and streets by digging them down and building them up, when necessary, the legislature not being prohibited by the Constitution from enacting such a statute, we think the defendant is entitled to judgment."

O'Connor v. Pittsburgh, 18 Penn. St. 187, was an action of tres-

^{*} Ante, p. 763.

Johnson v. City of Parkersburg.

pass on the case brought by Michael O'Connor, Roman catholic bishop of Pittsburgh, for the use of the Roman catholic congregation of St. Paul's church, Pittsburgh, against the mayor, alderman, and citizens of Pittsburgh. The church was much damaged, aye, ruined, by lowering the grade of the street. The jury found a verdict for \$4,000 damages for plaintiff, notwithstanding which LOWRIE, J., entered judgment on a reserved question for the defendants. In the Supreme Court, GIBSON, C. J., said: "We have had this cause reargued in order to discover, if possible, some way to relieve the plaintiff consistently with law; but I grieve to say we have discovered none. To the Commonwealth here, as to the king in England, belongs the franchise of every highway as a trustee for the public; and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, railroads, canals, or public roads laid out by the authority of the Quarter Sessions. * * * It must be admitted that while it is inequitable to injure the property of an individual for the benefit of the many, it will be impossible for a corporation to bear the pressure of successive common-law actions for the continuance of a nuisance, each verdict being more severe than the preceding one. The modification of the remedy would be for the legislature, which can turn compensation for a permanent detriment into the price of a prospective license; but to attain complete justice, every damage to private property ought to be compensated by the State or corporation that occasioned it, and a general statutory remedy ought to be provided to assess the value. The constitutional provision for the case of private property *taken* for public use extends not to the case of property *injured* or *destroyed*; but it follows not that the omission may not be supplied by ordinary legislation. No property was taken in this instance; but the cutting down of the street, consequent on the reduction of its grade, left the building useless and the ground on which it stood worth no more than the expense of sinking it to the common level. The loss to the congregation is a total one, while the gain to the holders of property in the neighborhood is immense. The Legislature that incorporated the city never dreamed that it was laying the foundation of such injustice; but as the charter stands, it is unavoidable."

There is in the written Constitutions of all the States ample protection against the *taking* of private property for public use without just compensation. But observation teaches us that often private

Johnson v. City of Parkersburg.

property is rendered almost if not quite valueless by public improvements where not one foot of it is *taken*. This was the case, as the court informs us, in *O'Conner v. Pittsburg*; and yet at common law there was absolutely no redress for the sufferer. A man owns a little strip of land near the line of a proposed railroad; there may be land condemned up to his line, the road being located on the land of his neighbor; the road benefits his neighbor because he has a large farm and the conveniences are considerable to him, while the small strip is almost ruined. The one gets damages for the land taken, but the other gets no damages for the injury inflicted. A municipal corporation makes a change in the grade of a principal street. One man owns a beautiful mansion on the summit of the hill. A change in the grade would be a great benefit to the whole city, and particularly to the owners of lots on said street, who have not yet built thereon, the council of the city determine to make the change; a cut up to the very line of the man's lot on the summit is made fifteen feet deep; everybody in the city except that man is benefited, but his property is ruined; he cannot use it as it is, and if it were practicable to lower his brick mansion, it would cost him more than it is worth. The common law says he is without remedy. His property was not taken for public use; but was it not damaged for public use? and is not the injury the same in character, if not in extent, as if it had been actually taken? Why should one man suffer all the loss for the benefit of the public? If the change was necessary for the public good, does not justice require that the public, for whose good it was made, should pay for the damages occasioned by it? This rule puts all the citizens upon an equality; the common-law rule makes the one suffer for the many.

It was to prevent this manifest injustice, that section nine of the Bill of Rights in the Constitution of West Virginia was inserted therein and adopted by the people. That section is:

“Private property shall not be taken *or damaged* for public use without just compensation; nor shall the same be taken by any company incorporated for the purpose of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged, for public use, or for the use of such corporations, the compensation to the owner shall be ascertained in such manner as may be prescribed by general law. *Provided*, that when required by

Johnson v. City of Parkersburg.

either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders."

The effect of this section is, to declare that a man's property-rights shall not be invaded for public use unless he receives just compensation, and that his right of property shall not be invaded by a damage inflicted upon it, though the property is not taken, as well as that the corpus of the property itself shall be protected from such invasion.

Section thirteen of article 2 (the Bill of Rights) of the Constitution of Illinois adopted in 1870, is as follows: "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owner thereof, shall remain in such owner, subject to the use for which it was taken." The Supreme Court of Illinois has repeatedly held, that this clause of the Constitution extended protection to property not actually taken for public use, but damaged for such use. *City of Pekin v. Brereton*, 67 Ill. 477 ; s. c., 16 Am. Rep. 629 ; *City of Pekin v. Winkle*, 77 Ill. 56 ; *City of Bloomington v. Brokaw*, id. 194 ; *City of Shawneetown v. Mason*, 82 id. 337 ; *City of Elgin v. Eaton*, 83 id. 535. The facts of the last case were very similar to those in the case at bar, and WALKER, J., who spoke for the whole court, after quoting from the Constitution, that "private property shall not be taken or damaged for public use without just compensation," said: "Now this was private property and the improvement was being made for public use; and if the property was damaged thereby, the appellee is entitled to just compensation for such damage."

The cases cited from Illinois, by the counsel for the city in his argument, which were decided since the case in 83 Ill., all arose before the adoption of the Constitution of 1870. In *Transportation Company v. Chicago*, 99 U. S., cited by counsel for the city, and which arose in Illinois, and was decided by the Circuit Court of the United States for the Northern District of Illinois, STRONG, J., said: "The present Constitution of Illinois took effect on the 8th day of August, 1870, after the work of constructing the tunnel had been substantially completed. It ordains that private property shall not be taken or damaged for public use without just compensation. This is an extension of the common provision for the

Johnson v. City of Parkersburg.

protection of private property; but it has no application to this case, as was decided in *Chicago v. Rumsey*." The reason why it was held in *Chicago v. Rumsey*, 87 Ill. 348, that the Constitution of 1870 had no application to the case, was, as the court say, "So far as the city caused, or could cause, this act to be done (the act complained of), it did so, not only before the adoption of the present Constitution, but even before the delegates were elected who framed that instrument."

It is clear then that if a municipal corporation, in changing the grade by raising or depressing its streets, permanently damages the private property of an individual, without acquiring the right to do so, and if demanded, by paying just compensation therefor, violates section 9 of the Bill of Rights, which declares that "property shall not be taken or damaged for public use without just compensation." But it is insisted by counsel for Parkersburg that the section of the Constitution, just quoted, does not operate *ex proprio vigore*, and that so far as it refers to damaging property, no statute has been passed putting it in operation, and until so put in force by legislation the common law prevails, and it is not liable for damages. It is true that no such statute has yet passed, as chapter 114 of acts of 1875, only provides for the ascertainment and payment of damages to the residue of a tract of land where a part has been taken. As far as the city is concerned it is very true that the second clause of the section is not self-executing, because it says, "where private property shall be taken or damaged for public use or for the use of such corporation, the compensation to the owner shall be ascertained in such manner as may be prescribed by general law; provided, that when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders." It required legislation to carry out this clause of the section. See *Supervisors of Doddridge Co. v. Stout*, 9 W. Va. 703; *Chahoon's case*, 20 Gratt. 733; *Lamb v. Lane*, 4 Ohio St. 167; *Watson's Ex'r v. Trustees of Pleasant Township*, 21 id. 666. In the last cited case the statute provided, that the trustees of the township might locate ditches or drains upon lands adjoining or lying near a public road, whenever in the judgment of the trustees such ditches or drains are necessary for the benefit of the road, but made no provision for compensation to the owner in money to be assessed by a jury for the land appropriated for such ditches or drains. The court held, that "for want of

Johnson v. City of Parkersburg.

such provision an appropriation of land for a ditch or drain under the act would be in contravention of section 19 of article 1 of the Constitution, which provides that when private property is taken 'for the purpose of making or repairing roads * * * a compensation shall be made to the owner in money; * * * and such compensation shall be assessed by a jury.' The Constitution in this particular does not execute itself." But they did not hold, that because no provision had been made whereby they could take the property by paying a just compensation for it, therefore they could take it nevertheless, and be exempt from action. The court perpetuated an injunction restraining them from taking it at all.

The private right of the individual was secure under the Constitution. That part did execute itself. It contained a positive inhibition on the part of the legislature to pass any law, by which an individual's private property could be taken or damaged for public use without compensation.

In *Pumpelly v. Green Bay Co.*, and *Eaton v. B. G. & M. R. R. Co.*, *supra*, the parties were acting under grant from the legislature of the States respectively; but in both cases it was held, that they could not in making their improvements invade the rights of private property by "taking" the same without just compensation, and that in doing so they were liable to an action. I have nowhere seen it contended that a clause of a Constitution, which declares that "private property shall not be taken for public use without just compensation," requires legislation to put it in force. It has always been regarded as self executing. It is a limitation, not only upon the rights of individuals and corporations, but also upon the legislatures of the States.

When the words "or damaged" were incorporated into the Constitution of West Virginia, in addition to the words "private property shall not be taken," the effect was as effectually to protect private property from being damaged for public use without just compensation as to prevent it from being taken for the same purpose without just compensation. So the Supreme Court of Illinois held in the case of *City of Elgin v. Eaton*, *supra*.

In that case the court say: "In this case the city entered upon the improvement of the street after the adoption of our present Constitution, and before the passage of our eminent domain law. The rights of the parties were then fixed, and cannot be altered by subsequent legislation; and the right to recover damages

Johnson v. City of Parkersburg.

was given by the Constitution. The first clause of section 9 of our bill of rights *ex proprio vigore* protects the private property of an individual from damage for public use without just compensation." There is nothing in the position we have taken that is in conflict with the principles laid down by this court in *Supervisors of Doddridge County v. Stout*, *supra*, and *Speidel v. Schlosser*, 13 W. Va. 686, or the principles of the decision of the Supreme Court of the United States in *Groves v. Slaughter*, 15 Pet. 449. The principles of these cases are readily distinguishable from the principles we hold in this case. But it is insisted that the Legislature has provided no remedy in a case like this. If a new right is created by statute and no remedy prescribed for the party aggrieved by the violation of such right, the court upon the principle of a liberal or comprehensive interpretation of the statute will presume that it was the intention of the legislature to give the party aggrieved a remedy by a common-law action for a violation of his statutory right, and he will be permitted to recover in an appropriate action. Sedg. on Stat. and Const. Law, 92, and cases cited; 2 Coke Inst. 74, 118; Bac. Abr. 16; *Clark v. Brown*, 18 Wend. 220. Whenever a statute creates a right, or a duty or obligation, then, although it has not in express terms given a remedy, the remedy which by the common law is properly applicable to that right or obligation follows as an incident. 1 Add. on Torts, 49, and cases cited. The court said in *Tapley v. Forbes*, 2 Allen, 24, that it is a well-settled and familiar principle that "if a right is conferred by statute without affording a specific mode for its enforcement, a party may resort to any common-law action which will afford him an adequate and appropriate means of redress." To the same effect is *Knowlton v. Ackley*, 8 Cush. 97.

In *Stearns v. Atlantic & St. Lawrence R. R. Co.*, 46 Me. 114, MAY, J., in delivering the opinion of the court, said: "The first objection now raised is, that this action cannot be maintained because no remedy is given by the statute creating the liability, nor by any other statute, nor by the common law. That the statute upon which the plaintiffs base their right to recover gives to them a right to compensation for the injury they have sustained is not denied, (Stat. of 1842, ch. 9, § 5); but it is insisted that the creation of such a right is wholly unavailing to the party injured unless the same statute or some other also provides some form of remedy. But such is not the law. Some form of action may always be maintained

Johnson v. City of Parkersburg.

for a violation of common-law right; and it is often said to be the pride of the common law that it furnishes a remedy for every wrong. In the absence of any authority to the contrary, it is not perceived why a legal right to compensation for actual damage sustained, even though such right depended wholly upon a statute, is not as worthy of protection in a court of law as any common-law right. The common law is said to be, in fact, nothing but the expression of ancient statutes; but whether this be so or not, the injury for the violation of a statute right is as real as are injuries which exist only by the common law. If a man has a right, he must, as has been observed in a celebrated case, have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal. *Ashby v. White*, 2 *Ld. Raym.* 953; *Westmore v. Greenbank*, *Willes*, 577, cited in *Broom's Maxims*, 147. To deny the remedy is therefore in substance to deny the right. And it makes no difference whether the right exists at common law or by statute. Hence the familiar maxim quoted by the counsel in defense, that 'wherever the statute gives a right, the party shall by consequence have an action to recover it.' The authorities cited in defense will be found to be in harmony with this maxim. The rule is now understood to be well settled that when a statute gives a right or forbids the doing of an injury to another, and no action be given therefor in express terms, still the party shall have an action therefor. *Broom's Maxims*, 149, 150, and cases cited. The cases cited for the plaintiff not only sustain the same position, but also show that where no other remedy is provided the proper remedy is a special action on the case."

A constitutional prohibition forbidding an injury to the property of a citizen is certainly as effective as a statute framed for the same purpose; and we have seen that such a prohibition is self-executing. As we have also seen, before the adoption of our present Constitution, no compensation could be recovered for consequential damages inflicted upon the private property of an individual, by work done for the public good, in raising or depressing the streets in a city. It was *damnum absque injuria*, that is, an injury without wrong. It was not contrary to law to thus damage private property, and it was not therefore a wrong, and the party was without redress. But it is different now; the Constitution denounces it as

Johnson v. City of Parkersburg.

a wrong against the individual now, to damage his private property without just compensation, and for that wrong he must have a remedy, although it is not pointed out in the Constitution, or by any statutory enactment thereunder. Where the Constitution forbids a damage to the private property of an individual, and points out no remedy, and no statute gives a remedy, for the invasion of his right of property thus secured, the common law, which gives a remedy for every wrong, will furnish the appropriate action for the redress of his grievance. We think therefore the declaration showed a good cause of action, and the demurrer thereto was properly overruled. As to the force of the act of the legislature set up in the declaration, we do not deem it material to inquire in this case. All reference thereto in the declaration may be regarded as surplusage. It is certain that the defendant, the city of Parkersburg, did not claim to be acting under it when it made the change in the grade of Pike street. As to the question presented, whether said act was in force when said change was made, or the other question that might be presented, whether, if in force, it is constitutional, we express no opinion, as the questions do not properly arise.

If the improvement of the plaintiff had been made before the street was made or a grade fixed at all, what his rights would be in that case we do not decide, as that question does not arise in this case. It is clear, from the evidence, that the council had fixed the grade of Pike street, and the city engineer gave the grade thus established to the plaintiff, and that in accordance therewith the plaintiff made the improvement, and after his improvement had been made, the council of the city, against the protest of the plaintiff, changed the grade by making a fill in the street of a number of feet in front of his property, and inflicted serious injury upon him.

Upon the question as to the establishment of the grade of the street, the records of the city council was proper for the jury, and the court did not err in admitting them. The question of damages was for the jury. The jury found that the plaintiff had been damaged \$200 by the raising of the street, and from the facts certified, we think that the verdict was warranted by the evidence, and the court did not err in refusing to set it aside.

The judgment of the Circuit Court of Wood county is affirmed.

Judgment affirmed.

GREEN and MOORE, JJ., concurred; HAYMOND, J., dissented.

Patton v. Moore.

PATTON V. MOORE.

(16 W. Va. 428.)

Fixtures — on land but not yet affixed — affixed and accidentally separated — execution.

An engine and boiler, brought by the owner of a mill upon the mill grounds for the purpose of being put into the mill, and necessary for the operation of the mill, are fixtures, although not actually annexed ; and such articles, once annexed, continue fixtures, although washed out by a flood.

If such articles, levied on, are afterward attached to the realty with the consent of the execution creditor, the lien of the execution is released.

BILL to enjoin execution sale. The opinion states the facts. The injunction issued below.

Thomas E. Davis, for appellant.

R. S. Blair, for appellees.

JOHNSON, J. That a steam engine and boiler, burrs and mill-irons necessary to the running of a mill as such are fixtures, is not now an open question. We have no hesitation in approving the conclusion of the court in *Green v. Phillips*, 26 Gratt. 752, which is, that the true rule in determining what are fixtures in a manufacturing establishment, where the land and buildings are owned by the manufacturer, is, that where the machinery is permanent in its character and essential to the purposes for which the building is occupied, it must be regarded as realty, and passes with the building ; and that whatever is essential to the purposes for which the building is used will be considered as a fixture although the connection between them be such that it may be severed without physical or lasting injury to either. In *Lewis v. Rossler*, 16 W. Va. 333, this court held, that the words fixtures and appurtenances have acquired a peculiar and appropriate meaning, and are to be construed according to such meaning, having due reference to the context, and the connection in which the words are used.

In the case at bar the description of the property in the contract of sale is the "Ritchie Virginia Mills," with a tract of about seventeen acres of land on which said mills are situated. That

contract of course passed the mills and fixtures which were a part thereof, consisting of engine, boiler, burrs, mill-irons, etc. The engine, boiler, burrs and mill-irons in controversy in this suit were on the property when the plaintiff, Patton, acquired an equitable title thereto. When Patton sold to Meserve, he reserved the engine and boiler, and sold them to another party. As far as Patton's rights were concerned, there was a complete severance of the property, and a conversion into chattels. *Lewis v. Rossler, supra*. Patton then canceled his contract with Meserve, and let Cochrane have the mill-property on the same terms as specified in his contract with Meserve. At this time certainly Patton would have had no right to complain, if the engine and boiler had been levied on and sold under an execution in favor of any one, as he had parted with his right to them. We are not considering the rights of Core in the premises, or whether he would have had a right to enjoin the severance of the engine and boiler from the mill.

But while Cochrane was in possession of the mill-property under his purchase from Patton, he purchased the same engine and boiler with the manifest intention of again making them fixtures in the mill, and had for that purpose hauled them into the mill-yard, and before he had put them into the mill, they were on the 30th day of December, 1870, levied on by sheriff Heaton, under an execution in favor of *Meserve, for the use of B. F. Moore v. Martin Cochrane*. Were they liable to be so levied upon that time?

In *Congregational Society of Dubuque v. Fleming*, 11 Iowa, 533, a bell had been used in the belfry of an old church-edifice of a religious society; a new building was erected and the old one sold, the bell being reserved. A tower was erected on the new building for the bell and a temporary frame-work was also erected upon the lot, upon which the bell was placed and used for church purposes with the intention on the part of the authorities of the society to place it permanently in the tower. It remained in the temporary frame for nearly a year, and was then removed to the place designed for it. It was held, that it never ceased to be a fixture, and that it was not subject to the levy of an execution as personal property.

In *Palmer v. Forbes*, 23 Ill. 301, it was held, that the rolling stock, rails, ties, chains, spikes and all other material brought upon the ground of the company, and designed to be attached to the realty, should be considered as a part of the realty. This decision was approved in *McLaughlin v. Johnson*, 46 Ill. 163. In the former

Patton v. Moore.

case the court said: "It is a familiar principle, that rails hauled on to the land designed to be laid into a fence, or timber for a building, although not yet erected, but lying around loose, and in no way attached to the soil, are treated as a part of the realty and pass with the land as appurtenances." See also, *Bishop v. Bishop*, 1 Kern. 123.

We think this is sound reasoning. If this were not so, persons involved in any degree would not have much encouragement to erect permanent improvements. They might have all their arrangements made to build, their contracts made, the material all on the ground, and the whole scheme might be frustrated, and irreparable loss inflicted by the levy of an execution on the materials thus collected and on the ground. And so with regard to a mill. It might be all complete except the engine and boiler, the motive power, without which it would be useless, and that is brought upon the ground to be attached, and before it is actually attached, it is taken in execution, and the whole mill-scheme, it may be, frustrated. We hold therefore if an engine and boiler have been bought by the owner of a mill, and hauled into the mill-yard with the *bona fide* intention of attaching them to the mill, and they are necessary for the purpose for which they are to be used, they must be regarded as a part of the realty, and not liable to the levy of an execution as personal property. The engine and boiler in this case were not liable therefore to be levied on as personal property by John Heaton, sheriff of Ritchie county, on the 30th day of December, 1870.

But if this were not true, and they were at that time mere chattels, they became a part of the realty by being attached to the freehold, with the consent of the execution-creditor, and the lien of the execution, if any existed, was thereby released. In *Heaton v. Findlay*, 12 Penn. St. 304, the owner of land sold a fixture to A., which was temporarily severed from the freehold. He then sold the land to B., with notice of the previous sale of the fixture. The fixture was never actually delivered, and it was in a short time re-annexed to the freehold and continued to be so used. At the date of the sale of the fixture there was a judgment recovered by a stranger against the owner of the land, which was a lien thereon; under this the land was sold to B. It was held that B. thereby became the owner of the fixture, nor is his title as sheriff's vendee affected by his knowledge of the sale, nor by his own previous admission that the fixture belonged to A., there being no contract

or consideration for such statements, which would preclude him from acquiring such title as a stranger might have acquired by such purchase. See also, *Goddard v. Bolster*, 6 Me. 427.

If Moore, the execution-creditor, had a lien on the engine and boiler by virtue of the levy, it was of course in his power to release that lien; and if by his consent the property was made a part of the freehold, that was certainly a most effectual mode of releasing his lien, because the power to enforce it under execution was forever gone. That Moore did intend, when he gave his consent after the levy that the engine and boiler should be attached to the mill, to release his lien on the property, if any he had under the levy, is made conclusive by the fact, that he lay quiet for nearly five years, and when the mill was washed away by the flood, he again had another execution issued upon the judgment, which was by B. F. Mitchell, sheriff of Ritchie county, on the 9th day of October, 1875, levied upon the same engine and boiler. Did the severance by the flood on the 2d day of August, 1875, convert the engine, boiler, burrs and mill-irons into chattels, so that they were subject to the levy of the execution on the 9th day of October, 1875? According to the decision in *Buckout v. Swift*, 27 Cal. 433, which laid down the broad proposition, that the severance and removal of a house from the freehold changes the character of the house from real to personal property, whether the severance is by the act of God or of man, it did have that effect. But we cannot approve that decision, and announced a contrary one in *Lewis v. Rossler*, *supra*. We find no authority to sustain the California decision; but on the contrary it was held in *Rogers v. Gilinger*, 30 Penn. St. 185, that the fragments of a building, blown down by a tempest, are not thereby converted into personalty, but pass to the purchaser of the realty at a sheriff's sale. STRONG, J., in delivering the opinion of the court, said: "What then is the criterion by which we are to determine whether that which was once part of realty has become personalty on being detached? Not capability of restoration to the former connection with the freehold, as is contended, for the tree prostrated by the tempest is incapable of re-annexation to the soil, and yet remains realty. The true rule would rather seem to be, that which was real shall continue real, until the owner of the freehold shall by his election give it a different character."

In *Goddard v. Bolster*, 6 Me. 427, the agent of the owner of a grist-mill having put into it his own mill-stones and mill-irons it

Patton v. Moore.

was held, that they became thereby the property of the owner of the mill, as part of his freehold, so that the agent could not lawfully sever them again ; nor could his creditors seize them for his debt, though the mill had been destroyed by a flood and they alone remained. We conclude therefore that it is a clear legal proposition, that the washing out of a mill by flood, of an engine, boiler, burrs and mill-irons, which were fixtures in the mill, does not convert them into personal property ; and when thus washed out they are not subject to the levy of an execution.

After they were thus washed out, Cochrane raised a new frame, the old having been carried away by the flood, got part of the fixtures back into the mill, and got it to running again, perhaps by water-power, and being unable to pay for it, surrendered the mill-property to Patton, and took back and cancelled the notes for the purchase-money, without any express reservation of the engine and boiler. We think it is an undisputed proposition, that where a purchaser of real property, who makes permanent improvements thereon attached to the freehold, and then being unable to pay for it surrenders the property to the vendor, without express reservation of the improvements, and cancels the contract of purchase, the improvements go with the property back to the vendor. Therefore when Cochrane surrendered the mill-property to Patton, the engine and boiler, which he had attached to the mill, not being expressly reserved, became the property of Patton.

It is insisted in the argument, that the demurrer to the bill ought to have been sustained, because a court of equity had not jurisdiction. Equity will take jurisdiction by injunction to preserve the inheritance, and where a mill is about to be dismantled by execution creditors of the owners who have levied on the fixtures attached thereto, equity will interfere to prevent it. This doctrine is recognized by this court in *Ferrell v. McMillan*, 7 W. Va. 223. The cases cited by counsel for appellant do not apply to a case like this. The jurisdiction in a case much like the one before us was sustained in *Green v. Phillips*, 26 Gratt. 752.

For the foregoing reasons the decree of the Circuit Court of Ritchie county is affirmed with costs and \$30.00 damages.

Decree affirmed.

The other judges concurred.

NEELY V. JONES.

(16 W. Va. 625.)

Subrogation — assignment — payment of judgment-debt by sheriff.

Unauthorized payment by a stranger does not discharge a debt, nor authorize a suit at law by him, unless the debtor ratifies such payment by pleading or reliance; but in equity the stranger will have relief, and in case of an agreement for an assignment of the debt the stranger may enforce the demand without an actual assignment.

A sheriff, having or having had an execution in his hands, may pay the judgment-debt to the creditor, and have the same rights against the debtor as a stranger, whether he takes an assignment of the judgment or not.

BILL for subrogation. The opinion states the point.

T. W. Harrison, for appellant.

C. Boggess, for appellees.

GREEN, President. The first inquiry presented by the record is, whether the original bill in this cause was fatally defective on demurrer. This bill states that Neely, the sheriff of Doddridge county, paid to the plaintiffs in several judgments against the defendant, Thomas S. Jones, on which executions had issued, the amount of those judgments; and the defendant, Thomas S. Jones, having a tract of land on which these judgments were a lien, Neely, the sheriff, by this bill claims that he is entitled to be substituted to the rights of the plaintiffs in these judgments, who were co-plaintiffs with him in this cause, and to enforce the same out of said lands. The judgments were rendered in 1855; and this suit was instituted in 1858.

It is well settled that a stranger, who pays the debt of another without his knowledge and authority, cannot sue the debtor for money paid for his use, unless the debtor has ratified the act of the stranger by promising to repay him the amount, or in some other manner. See *Beach v. Vanderburgh*, 10 Johns. 361; *Jones v. Wilson*, 3 id. 434; *Menderback v. Hopkins*, 8 id. 436; *Overseers of Walkill v. Overseers of Mamakating*, 14 id. 87; *Lipscomb's Admr v. Littlepage*, 1 H. & M. 453; *Harrison v. Hicks*, 1 Port. (Ala.) 423;

Neely v. Jones.

Carter v. Black, 4 Dev. & Bat. 425. These cases show, that a sheriff or other officer, who has or has had an execution process in his hands, if he pays the judgment or claim without the request or authority of the defendant, where it is not afterward approved or ratified by the defendant, is regarded precisely as any other stranger would be regarded and he cannot bring an action of *assumpsit* to recover of the defendant the amount so paid by him.

The next inquiry is: Does such a payment discharge and satisfy the original debt, so that no suit can thereafter be brought for the original debt, or if it be an execution, so that it cannot afterward be enforced in any manner? There have been cases in which it has been stated by the court, that such a payment by a stranger absolutely extinguished the debt; and the inference to be drawn from them is, that the debt is by such unauthorized payment utterly extinguished at law or in equity. See *Sandford v. McLean*, 3 Paige, 122; 23 Am. Dec. 773; *Banta v. Garmo*, 1 Sandf. 384, 386; *Douglass v. Fagg*, 8 Leigh, 601, 602. But these views are not in other cases approved; and it has been decided, that the payment of a debt by a stranger without the authority expressed or implied of the debtor is no discharge of the debt, unless the payment is subsequently in some manner ratified by the debtor, but whenever ratified, it will relate back to the date of the payment and have the same effect as if it had been expressly authorized by the debtor, and therefore it may be ratified even after suit is brought upon it; and the debtor's relying upon it as a payment is such a ratification. See *Simpson v. Eggington*, 10 Ex. 845, 848; *Kemp v. Balls*, id. 610; *Belshaw v. Bush*, 11 C. B. (73 Eng. Com. Law.) 207; *Whiting v. Independent Mut. Ins. Co.*, 15 Md. 314; *Leavitt v. Morrow*, 6 Ohio St. 71; *Webster v. Wyster*, 1 Stew. (Ala.) 184.

From these decisions it would seem to follow as a necessary consequence, that if after the stranger pays a debt the debtor ratifies the payment, as by relying on this payment as a payment when sued upon the debt, or in any other manner, he would be liable in an action of *assumpsit*, brought by the stranger against him for money paid at his request for his use, the subsequent ratification being equivalent to a previous request. See *Lipscomb v. Littlepage*, 1 H. & M. 453.

But if the debtor instead of ratifying the payment of his debt by the stranger should repudiate this payment by a stranger of his debt, which he might well do, because he disputed that he was bound for the original obligation, or because he himself had paid it,

or did not for any reason owe the debt, and for many other conceivable reasons, then the payment by the stranger could not operate as a discharge of the debt, but the debt would still continue to have an existence after the payment by the stranger. The legal right of action would of course remain in the original creditor, and the suit at law would necessarily be in the name of the original creditor. But as the original creditor had received full payment of the claim from the stranger, it seems to me that he would be under an implied obligation to transfer the debt to the stranger, after the debtor would not ratify the payment and thus extinguish the debt. For if under these circumstances a court of equity would not regard the stranger as the equitable owner of the debt, the result would be that the creditor could make it out of the debtor, after it had been paid in full by the stranger; and thus the creditor would be twice paid his debt, while the stranger would have no one to whom he could look for the repayment of what he had paid out. This result would not only be inequitable, but contrary to the obvious implied understanding between the creditor and the stranger when the debt was paid. It is obvious that the stranger did not mean to present the creditor with the amount paid, for it was made as a payment of the debt, and not given as a present. And if it cannot operate as a payment because of the debtor's refusal to recognize it as a payment, the general object which the parties had in view would under such circumstances be carried out to the extent to which it would under such circumstances be capable of being carried out, by the creditor assigning the debt to the stranger. And under these circumstances, it seems to me, a court of equity would, when the debtor refused to ratify the payment, imply that there was such contract, and the rights of the parties would be the same as though the agreement had been originally that the payment by the stranger to the creditor shall operate as a full discharge of the debt, if the debtor would ratify it as a payment, and if he would not, and it could not therefore so operate, then that the creditor would transfer to the stranger his right to the debt.

So understood, if the payment was not ratified by the debtor, the stranger, who would then be the equitable owner of the debt, could sue at law for it in the name of the original creditor for his own use. It is true that the debtor might defeat this action by pleading the payment made by the stranger to the creditor as a discharge of the debt. For he would have the right, as we have seen, to ratify

this payment even after suit; nor would his right so to do be affected by his refusal before suit to so ratify it; for a principal may, after he has refused to ratify the act of a person acting as his agent, change his mind and ratify the act; and whenever he does so, it relates back to the doing of the act and operates just as if he had previously authorized the doing of the act. But if the debtor thus defeated the action it would follow that the stranger could then bring against him an action of *assumpsit* for money paid to his creditor at his request; for this ratification would be the equivalent of a previous request to the stranger to pay the debt to his creditor. If however instead of bringing a suit at law in the name of the original creditor for his use the stranger chose, he could institute his suit in equity as the equitable owner of the debt; and if the debtor should deprive him of an equitable right to the debt by answering that he then ratified and approved the payment of the debt by the stranger, and it was then extinguished, this very answer would show the liability of the debtor to refund to the stranger the amount he had paid for him to the creditor with interest; and a court of equity having the parties all before it and the facts disclosed by the pleadings would not turn the stranger over to another common-law suit against the debtor, but to avoid multiplicity of suits would administer justice by at once decreeing the payment to the stranger of the amount he had paid for the debtor and the interest thereon, unless some just defense or set-offs appeared.

These conclusions are, I think, not only the legitimate result of the authorities I have before cited, but are, I think, sustained by other decisions more directly. It is true that it has been frequently decided, that it is only in case where the person paying the debt stands in the situation of a surety, or is compelled to pay in order to protect his own interests, that a court of equity substitutes him in the place of the creditor as a matter of course without any agreement to that effect. See *Jannes v. Stephens*, 2 Pat. & H. 11; *Douglas v. Fagg*, 8 Leigh, 588, 602; *Swann v. Patterson*, 7 Md. 164; *Bank of United States v. Maston*, 2 Brock. 254; *Burr v. Smith*, 21 Barb. 262.

But it must not be inferred from these decisions that the right of substitution arises from a supposed contract between the principal debtor and his surety. As Chancellor KENT says in *Hays v. Ward*, 4 Johns. Ch. 130, "This doctrine does not belong merely to

the civil-law system ; it is equally a well settled principle of the English law, that a surety will be entitled to every remedy, which the principal creditor has to enforce every security, and to stand in the place of the creditor, and have those securities transferred to him, and to avail himself of those securities against the debtor. This right stands not upon contract, but upon the same principle of natural justice upon which one surety is entitled to contribution against another." Lord BROUGHAM, speaking of this right of substitution in *Hodgson v. Shaw*, 3 Myl. & K. 183, said: "The rule here is undoubted, and is founded on the plainest principles of natural justice, that the surety paying off the debt shall stand in the place of the creditor, and have all the rights he has for the purposes of obtaining his reimbursement. It is scarcely possible to put this right of substitution too high ; and the right results more from equity than from contract or *quasi* contract, unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication."

The right of substitution therefore does not arise from any supposed contract between the principal debtor and his sureties ; and one is entitled to avail himself of this right, who is compelled to pay a debt for which he is not primarily responsible, though he may not stand in relation to the principal debtor strictly as a security ; as when he guarantees a debt, for which he is not bound, at the instance of the creditor and not the debtor, and though this guaranty was made without the knowledge or consent of the debtor. See *Mathews v. Aiken*, 1 Com. 595 ; *Peake v. Estate of Darwin*, 25 Vt. 32 ; *Carter v. Jones*, 5 Ired. Eq. 197 ; *Elhilton v. Newman*, 20 Penn. St. 281.

It is true that the syllabus in *Carter v. Jones*, 5 Ired. Eq. 196, states in broad terms, that "a person, who pays off a bond due to a creditor without the request of the debtor express or implied, cannot recover from the debtor at law. But in equity he is considered as the equitable purchaser of the bond, and is therefore entitled to relief against the debtor." But this statement is not justified by the decision actually rendered in that case, and is not supported by the authorities. In that case the stranger, when he paid off the bond, was compelled to pay it off, having previously guaranteed its payment, it is true without the consent or knowledge of the original obligor. It really therefore resembles closely the case of *Mathews v. Aiken*, 1 Com. 595.

Neely v. Jones.

The true basis of these decisions is, that a stranger may purchase a debt of a creditor without the knowledge or consent of the debtor, and the debt may be expressly assigned to the stranger; and if it is the design of the stranger to purchase the debt, and if the money is paid by him and received by the creditor with the design that it shall operate as a purchase, it will so operate, and the transaction will be regarded as an equitable transfer of the debt; and where the stranger has guaranteed the debt at the instance of the creditor, and afterward pays on his guarantee the amount of the debt to the creditor, there will under these circumstances be an implied contract to transfer the debt, which will operate very much as a substitute, though it has a somewhat different origin, that is, an implied contract which is regarded as an equitable assignment. But where a stranger simply pays a debt, the presumption is that he expects the debtor to repay him the money he has advanced, and no implication can justly arise, that from the mere payment it was understood or impliedly agreed with the creditor that the debt and all its securities should be transferred absolutely to him. If the debtor refuses to ratify the payment which the stranger has made for him, then, as the debt is really unpaid and belongs still legally to the creditor, a fair implication arises that it is held for the benefit of the stranger. It has accordingly been frequently asserted by courts, that a stranger paying the debt of another will not be subrogated to the creditor's rights without an agreement to that effect. See *Swann v. Patterson*, 7 Md. 164; *Bank of the United States v. Marston*, 2 Brock. 254; *Burr v. Smith*, 21 Barb. 262; *Douglass v. Fagg*, 8 Leigh, 602.

Of course the stranger, at the time he pays to the creditor the amount of the debt, may take an assignment of it without the consent or knowledge of the debtor; and if when he pays the amount, there be an express agreement that the debt is to be assigned to the stranger, this would amount to an equitable assignment of the debt, though no formal assignment was ever executed; for this understanding shows that the stranger did not pay the debt, but really purchased it, which of course he could do without the consent of the debtor. But unless such express agreement is proven, the payment of the debt by the stranger, if subsequently ratified by the debtor, from the time of its ratification extinguishes the debt at law and in equity. But if the debtor refuses to ratify the payment made by the stranger, the debt is not extinguished in law or

Barber v. Fire and Marine Insurance Company of Wheeling.

equity. Its legal existence continues in the original creditor; but the equitable title to the debt vests in the stranger.

[Omitting an *obiter* discussion, and technical points.]

Decrees reversed, cause remanded.

The other judges concurred.

BARBER V. FIRE AND MARINE INSURANCE COMPANY OF WHEELING.

(16 W. Va. 653.)

Insurance — limitation — when attaches.

An insurance policy provided that no action should be sustained thereon unless commenced within six months after the loss should occur; and also that no suit could be maintained until arbitrators had fixed the amount of the loss. *Held*, that the action could be commenced within six months after the arbitrators had fixed the amount of the loss, although more than six months after the loss occurred.*

ACTION on fire insurance policy. The court gave the following instructions below:

“11. The twelfth section of the policy in evidence, providing that ‘it is furthermore expressly provided and mutually agreed, that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within six months next after the loss shall occur; and shall any suit or action be commenced against this company after the expiration of the aforesaid six months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding, is a part of the contract sued upon, and is valid and binding.’”

The opinion states other facts. The plaintiff had judgment below.

* See *Hay v. Star Fire Ins. Co.* (77 N. Y. 235), 33 Am. Rep. 607.

Barber v. Fire and Marine Insurance Company of Wheeling.

Caldwell & Caldwell, for plaintiff in error.

Henry M. Russell, for defendant in error.

JOHNSON, J. But one decision, as far as we have been able to find, supports the said instruction as expounding the law correctly, that is, *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92; s. c., 33 Am. Rep. 47. We cannot approve that decision. The opinion of the court in that case, as we think, loses sight of the fundamental principle in the construction of contracts, that all the provisions shall be taken into consideration, and reconciled if possible, so that the true intent of the parties to the contract may be ascertained.

In the contract sued on in that case appeared two clauses, apparently in conflict, and the same precisely as appear in the case at bar; the one, that no suit could be maintained upon the policy until arbitrators had fixed the amount of the loss, and the other, that no suit could be maintained, unless the action was brought within six months next after the loss should occur. It is plain that if these clauses be construed separately, and effect given to each literally, it might be no suit at all could be maintained upon the policy; and this would result from the language used in the policy itself.

In this Illinois case the court construed the clauses separately without any reference to each other, and held that the plaintiff by the plain language he had used in his contract was barred. We take it to be well settled, that if a clause in a contract declares that for a breach of the contract no action can be maintained and no remedy had, such a clause is absolutely void, as against public policy. But courts will give effect to every provision of a contract, if it can be done, and will not hold that the parties intended by their contract to violate the law, if it is possible by looking to all the provisions of the contract to avoid that conclusion.

In *Mayor v. Hamilton Fire Ins. Co.*, 39 N. Y. 45, the tenth condition of the policy provided among other things as follows: "And it is hereby expressly agreed, that no suit or action of any kind against said company for the recovery of any claim upon, under or by virtue of this policy shall be sustainable in any court of law, unless such suit or claim shall be commenced within the term of six months after any loss or damage shall accrue," etc. The former part of the condition immediately preceding is: "in case of any loss

Barber v. Fire and Marine Insurance Company of Wheeling.

or damage to the property insured, it shall be optional with the company to replace the articles lost, or to rebuild or repair the buildings within a reasonable time, giving notice of their intention to do so within thirty days after having received the preliminary proofs of loss required by the ninth article of these conditions." The eleventh article provided, that "payment of loss should be made in sixty days from the date of the preliminary proofs of loss by the parties." The defendant insisted that the suit was barred, as suit was not commenced within six months of the loss of the property. HUNT, J., in delivering the opinion of the court, said: "The counsel for the appellants insist, that the word 'adjustment' is inaccurately used in this connection, that it is only appropriate in the settlement of marine losses, and then not by means of the action of parties themselves. This is not impossible. In the preceding section, when it is said, that 'unless such suit or claim shall be commenced within the term of six months after any loss or damage shall accrue,' the words 'loss or damage' are not used with legal precision. 'Within six months after the right of action shall have accrued' was no doubt what the parties intended. That construction would cut off five years and six months of the right to sue as given by law; and to hold that it extended as much farther as the right to serve and object to preliminary proofs might require, with sixty days added to that, would require of the sufferer very prompt action indeed to enable him to receive any benefit from his policy.

"But the condition gives the company sixty days from the date of 'the adjustment of the preliminary proofs of loss by the parties' before the loss is payable. To 'adjust' in its fair meaning is to settle, or bring to a satisfactory state, so that parties are agreed in the result (Webster). * * * If they do not agree, it can hardly be termed an adjustment by the parties, although the law may itself determine the sufficiency of such proofs. In the present case the parties had not adjusted the proofs so recently as the 12th of February, 1859, when additional proofs were served, and possibly not as late as the 18th of that month, when the defendants made a demand of still further proofs. I infer that the plaintiffs relied upon their last proofs as sufficient and refused to furnish any other, as the case contains no evidence of any further action in that respect. If however we fix the time when the preliminary proofs were complete, as on the 12th day of February, 1859, the defendants

Barber v. Fire and Marine Insurance Company of Wheeling.

were under no obligation to pay, and no suit could successfully be commenced against them, until sixty days from that date.

“This is the period in my judgment at which the claim or right to sue became forfeited against the company. At the end of these sixty days the period of six months commences to run. This I understand to be the necessary result of the reasoning of Judge WRIGHT in *Ames v. Union Ins. Co.*, 14 N. Y. 253.”

See Judge PAULL's opinion in *McFarland v. Peabody Ins. Co.*, 6 W. Va. 431; *Killips v. Putnam Fire Ins. Co.*, 28 Wis. 484; s. c., 9 Am. Rep. 506.

In *Stout v. City Fire Ins. Co. of New Haven*, 12 Iowa, 371, the condition in the policy was similar to the one under discussion. BALDWIN, J., in delivering the opinion of a majority of the court, said: “A contract of insurance is treated like any other contract; and the same rules of construction must govern it. To construe this policy, we must take our stand-point where the parties themselves stood, consider each and all of its parts, and if there are conflicts in the different provisions of the policy, then the facts and circumstances surrounding the transaction must determine how the parties themselves understood it, and that construction must prevail. The point once settled that the interest insured was a mechanic's lien, and the conditions of this policy such that the assured or his assignee is required before the commencement of his suit upon the policy to prove to the company the value of the interest that he may have in the building insured, and if this cannot be done in the ordinary proceeding in courts, necessary to be pursued, or if such proof cannot be made in a legitimate way within one year after loss, then this condition, requiring suit to be commenced within one year, is rendered inoperative by the parties themselves.”

Longhurst v. Star Insurance Co., 19 Iowa, 364, was a similar case, in which Low, J., in delivering the opinion of a majority of the court, said: “The defendant in granting a policy upon a mechanic's lien admits that it is an insurable interest. * * * If then the company consent to grant a policy upon such an interest, they do so subject to the unavoidable delay in the judicial ascertainment of the value of that interest, if a loss should occur. If with reasonable diligence that value cannot be legally ascertained in time to bring an action on the policy within a year from the date of the loss, then it follows, unless you wish to impute a dishonest purpose on the part of the company, that in granting such a policy they intended

Barber v. Fire and Marine Insurance Company of Wheeling.

to waive, in this class of insurable interests, the condition which limits the right of action on the policy to twelve months. By putting this construction upon the contract of insurance you preserve the upright intent of the company intact. Whereas if you put the other construction upon it, you by implication charge, or perhaps it would be better to say judicially determine, that the company granted a policy for a valuable consideration paid, which at the time they had reason to believe would be no risk to them, and no protection to the insured, and thereby obtained money for themselves under false pretenses. True charity thinketh no evil. It is therefore right for us to presume that it was the honest intent of the company to insure the plaintiff's mechanic's lien upon the premiums specified against loss by fire, and upon the other hand, that it was the expectation of the insured in paying the required premiums, that this policy would cover the loss, and give him the requisite protection. It is the business of the court in construing the contract to give effect if possible to the real intent and expectations of the parties. That can only be done in this case by holding, that the fifteenth condition of the policy under discussion is not applicable to this particular class of insurable interest, and that when the defendant consented to take risks of this kind, it either intended to waive the limitation, or have it to commence running from the date that the value of the mechanic's lien should be judicially ascertained."

We do not think in such cases there is a waiver of the clause in the policy, but that the whole contract construed together shows the intent of the parties, that the period of limitation agreed upon by the parties should commence to run from the time the right of action on the policy accrues. We hold that where a condition in a policy of insurance provides for an indefinite period to elapse before suit shall be brought on the policy, and that no suit shall be brought until the thing so provided for is done, to accomplish which may take more than six months without the fault of either of the parties to the contract, and the condition further provides that no suit on the policy shall be maintained, unless commenced within six months next after the loss shall occur, the intent of the parties to the contract is, that the six months' limitation should commence to run when the cause of action accrues, and not before.

In the case at bar, the policy provides that the loss should be paid sixty days after due notice and proofs of the same should have

Barber v. Fire and Marine Insurance Company of Wheeling.

been made by the assured, and received at the said company's office in accordance with the terms and provisions of said policy, unless the property should be replaced, or the company should have given notice of their intention to rebuild or repair the damaged premises. The ninth condition of the policy provides, as follows :

“ Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company, and as soon thereafter as possible render a particular account of such loss signed and sworn to by them, stating whether any, and what other insurance has been made on the same property, giving copies of the written part of all policies thereon, also the actual cash value of the property, and their interest therein, for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof were used at the time of the loss ; when and how the fire originated ; and shall also produce a certificate under the hand and seal of a magistrate or notary public (nearest the place of the fire, not concerned in the loss, as a creditor or otherwise, nor related to the assured) stating that he has examined the circumstances of the assured and verily believes, that the assured has without fraud sustained loss on the property insured to the amount which such magistrate or notary public shall certify. The assured shall, if required, submit to an examination or an examination under oath by any person appointed by the company, and subscribe to such examinations when reduced to writing, and shall also produce their books of account and other vouchers, and exhibit the same for examination at the office of the company, and permit extracts and copies thereof to be made ; the assured shall also produce certified copies of all bills and invoices, the originals of which have been lost, and shall exhibit all that remains of the property which was covered by this policy, damaged or not damaged, for examination, to any person or persons named by the company.

“ When personal property is damaged, the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity, quality and cost of each article. The amount of sound value and damaged shall then be ascertained by appraisal of each article by competent persons (not interested in the loss as creditors or otherwise, nor related to the assured or sufferers) to be mutually appointed by the

Barber v. Fire and Marine Insurance Company of Wheeling.

assured and the company, their report in writing to be made under oath before any magistrate or properly commissioned person, one-half of the appraisers' fees to be paid by the assured.

“The company reserves the right to take the whole or any part of the articles at their appraised value ; and until such proofs and declarations and certificates are produced, and examinations and appraisals permitted by the claimant, the loss shall not be payable.”

The insurance was on a two-story frame building operated by steam, and used as a manufactory of wagons, buggies, carriages and agricultural implements, and the machinery, shafting, belting, engine and tools therein contained, and the stock manufactured, unmanufactured and in process of manufacture, therein contained.

The ninth condition of the policy further provides as follows:

“In case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy ; and provided further, that it shall be optional with the company to repair, rebuild or replace the property lost or damaged with other of like kind and quality, within a reasonable time, giving notice of their intention so to do within thirty days after receipt of proofs herein required ; and in case this company elect to rebuild, the assured shall, if required, furnish plans and specifications of the buildings destroyed.”

The twelfth condition provides as follows:

“It is furthermore expressly provided and mutually agreed, that no suit or action against the company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery, until after an award shall have been obtained, fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within six months next after the loss shall occur.”

Here is an indefinite period, within which the arbitrators may fix the amount of loss or damage, a period, which without the fault of either of the parties to the contract might extend beyond six months. If it did, it could not be said in the absence of proof that the defendant had waived the conditions, because on the contrary it might have done all in its power to have the arbitrators

Barber v. Fire and Marine Insurance Company of Wheeling.

act as speedily as possible. It would alter the case, if the condition did not declare that suit could not be maintained "until after an award had been obtained fixing the amount of such claim." Some of the authorities have given a literal construction to similar conditions containing provisions for arbitrators; but in the absence of a condition denying the right to bring suit before the award, some of the authorities give force to all the provisions, as they find them; but in all the cases I have examined, except the Illinois case, there was some specified definite time provided for in the contract, within which suit might be brought. To give the construction contended for by the company, there is no time given in the policy within which the plaintiff might bring his suit. He could not bring it before the award; he is expressly denied that right. The award might not be made until the six months had elapsed; he could not then bring his suit. The same reasoning we have applied to the arbitrators' clause, applies to the others referred to, because there is no definite time fixed in any of them, when suit might have been brought. We would be compelled either to hold that the condition is void, as against public policy, or to hold, as we do, that the true construction of the policy is, that the six months provided in the condition did not commence to run until the right of action accrued on the policy. We could not hold that the company intended to do wrong, and make a void condition, unless there was no escape from such a conclusion.

Judgment of the municipal court must be affirmed with cost and \$30 damages; and the case is remanded to the municipal court to be proceeded in according to the principles laid down in the foregoing opinion, and according to law.

Judgment affirmed.

The other judges concurred, except MOORE, J., dissenting.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

TROEWERT V. DECKER.

(51 Wis. 46.)

Sunday — "business" — lending money.

Lending money to be repaid on demand is "business" within the meaning of the statute prohibiting "labor, business or work, except only works of necessity or charity," on Sunday, and such an agreement is presumptively void, although the money is retained and used without any offer to return it.*

ACTION to recover money lent. The opinion states the case. The plaintiff had judgment below.

Conrad Krez, for appellant.

William H. Seaman, for respondent.

CASSODAY, J. This action is to recover for a sum of money alleged to have been "lent" to the defendant at his request, upon his promise to pay back the same whenever thereunto requested, but which had never been paid to the intestate, nor to the plaintiff

* See note, 82 Am. Rep. 560.

Troewert v. Decker.

as administrator, although the defendant had often been requested to pay the same before the commencement of this action. The answer "admits the receipt of the money," but alleges that it was paid to him, and the contract and promise to repay the same was made on Sunday, and therefore denies the indebtedness. The undisputed evidence shows that the loan and promise were made on a Sunday. The court found that the defendant had and received the money from the deceased on Sunday, "to be repaid * * * on demand," but that the defendant had "failed and neglected to repay" the same or any part thereof, and as a conclusion of law, that the plaintiff was entitled to recover the amount due.

Section 4595, R. S., provides, among other things, that "any person who shall * * * do any manner of labor, business or work, except only works of necessity and charity * * * on the first day of the week, shall be punished by fine not exceeding ten dollars." The court does not find, and there is no evidence to show, that the case comes within the exception named in the statute. The loan of money, and the promise to repay, alleged in the complaint and admitted in the answer, were clearly "business," within the meaning of this section, and hence it was presumptively illegal. If it was possible to bring the case within the exception named in the statute, the burden was on the plaintiff to do so. *Bosworth v. Swansey*, 10 Metc. 363; *Jones v. Andover*, 10 Allen, 18, 21; *Hinckley v. Penobscot*, 42 Me. 89. But it is argued by counsel with some plausibility, that although the contract was illegal and void, yet the subsequent retention of the money without offering to return it and the using of it, and the refusing to take it back, constituted a ratification, and an implied promise to repay upon each subsequent secular day. In support of this theory counsel cite *Williams v. Paul*, 6 Bing. 653; *Adams v. Gay*, 19 Vt. 358; *Sumner v. Jones*, 24 id. 317; *Brown v. Timmany*, 20 Ohio St. 82; *Tucker v. Mowrey*, 12 Mich. 378; *Dodson v. Harris*, 10 Ala. 566; *Sayre v. Wheeler*, 31 Iowa, 112.

In *Williams v. Paul* the bargain was made on Saturday, and the price to be subsequently paid was agreed upon at the same time, subject to the defendant's approval of the property upon inspection the next morning, which was Sunday. Accordingly on Sunday the inspection was had, and the property approved and delivered. Subsequently, the defendant, being applied to for the price, said he would settle at a time named. Failing to do so, an action was brought

for the price, and the plaintiff recovered a verdict, and the rule was to set it aside and enter a nonsuit under the statute of 29 Charles II, chap. 7, substantially like ours, was discharged by the Court of Common Pleas. PARK, J., stated the grounds thus: "Here it appears that the defendant not only retained the animal, but made a new promise to pay, subsequently to the Sunday, and his present refusal is not consistent with the practice of a very sincere Christian." Eight years after, in *Simpson v. Nicholls*, 3 M. & W. 240, 244, and a note to that case found in 5 M. & W. 702, it was "doubted whether the case of *Williams v. Paul* could be supported in law," on the ground "that although the contract was void as being made on a Sunday, yet as the property in the goods passed by delivery, the promise made on the following day to pay for them could not constitute any new consideration;" and the Court of Exchequer held on demurrer that the plaintiff could not recover the value, on the ground that defendant, after the sale and delivery of the goods, kept them for his own use without returning or offering to return them.

In *Tuckerman v. Hinkley*, 5 Allen, 454, it is said by CHAPMAN, J., that "the case of *Williams v. Paul*, 6 Bing. 653, * * is not to be relied on." In *Kountz v. Dickson*, 40 Miss. 341, 345-6, the court said. "We have examined these cases (among which are *Williams v. Paul* and *Adams v. Gay*, 19 Vt. 369, *supra*), * * and we are constrained to say that they are founded on reasons which appear to us to set aside the most reverend and firmly settled principles of law applicable to the subject of illegal contracts. Were we to follow them we should have to overrule principles repeatedly and invariably recognized by this court." In *Boutelle v. Melendy*, 19 N. H. 196, *Williams v. Paul* is overruled, and the case of *Simpson v. Nicholls*, *supra*, followed, and the court held that "an illegal contract is incapable of ratification, or of becoming the consideration of a subsequent promise." *Williams v. Paul* was followed in *Adams v. Gay*, *supra*, but in the later case of *Sumner v. Jones*, 24 Vt. 317, the court said: "Whatever may be the views of the English courts in relation to the case of *Williams v. Paul*, that case has been referred to in all the above cases (*Barron v. Pettes*, 18 Vt. 385; *Adams v. Gay*, 19 id. 358; *Sargeant v. Butts*, 21 id. 99); in some without the expression of any satisfaction, and in others by a direct approval of its doctrine. The principle of these cases must decide the present." And on page 322 the court said: "It is evident that the English

Troewert v. Decker.

authorities have not gone to this extent" (an affirmation and promise to pay the note implied by the retention of the goods as sufficient to sustain an action); "for while it has been held that a subsequent promise is sufficient to sustain a recovery for the value of the property, it has never been held in those courts that a promise can be implied from the mere fact of a retention of the property, or that subsequent payments are equivalent to an express promise." In that case it was held that a note given on Sunday for a horse then purchased, and subsequent partial payments, and retention of the horse without offering to return the same, was such a ratification as would maintain a suit for the balance of the note. But this decision, as we have seen, was based upon former decisions in that State, acknowledged to be in conflict with the later English cases, and certainly in direct conflict with the whole current of Massachusetts cases. *Myers v. Meinrath*, 101 Mass. 366; s. c., 3 Am. Rep. 368. In this last case it was expressly held that "an action will not lie for the conversion of a chattel sold and delivered by the plaintiff to the defendant in exchange for another chattel on the Lord's day, and retained by the defendant afterward, notwithstanding the return by the plaintiff of the chattel for which it was exchanged, and his demand for a corresponding return by the defendant." The later English cases, the New Hampshire and Massachusetts cases, are also followed in Maine. *Pope v. Linn*, 50 Me. 83.

In the case of *Tucker v. Mowrey*, 12 Mich. 378, it was held that the contract of sale and delivery made on Sunday was so utterly void that no title passed, and that therefore the vendor might on a subsequent day tender back the price and recover the property. No case is cited in support of this doctrine, except an early case in the same State, which is followed. But this is going much further than *Williams v. Paul*, and much further than the Vermont cases; for they allow subsequent ratification on the ground that the property passes, and that the transaction is not *malum in se* but *malum prohibitum*. *Dodson v. Harris*, 10 Ala. 566, goes on the same theory as *Tucker v. Mowrey*, and the same remarks are applicable to it. The true rule seems to be stated by MAULE, J., in *Fivas v. Nicholls*, 2 M. G. & S. 501, where he said: "The plaintiff cannot recover where in order to sustain his supposed claim he must set up an illegal agreement to which he himself has been a party." So PARKER, C. J., in *Smith v. Bean*, 15 N. H. 577, said "It is generally said of such illegal contract that it is void. If this were so,

and the contract, in the broad sense of the term, were void, no property would pass by it; the vendor might reclaim the property at will; and being his property, it would be subject to attachment and levy by his creditors, in the same manner as if the attempt to sell had never been made. But this is not what is intended by such phraseology. The transaction being illegal, the law leaves parties to suffer the consequences of their illegal acts. The contract is void so far as it is attempted to be made the foundation of legal proceedings. The law will not interfere to assist the vendor to recover the price." These same remarks are quoted with approval by the court in *Perkins v. Jones*, 26 Ind. 502. In *Holt v. Green*, 73 Penn. St. 198; s. c., 13 Am. Rep. 737, MERCUR, J., said: "The test, whether a demand connected with an illegal transaction is capable of being enforced by law, is, whether the plaintiff requires the aid of the illegal transaction to establish his case. If a plaintiff cannot open his case without showing that he has broken the law, a court will not assist him. * * * The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded on its own violation."

In *Tillock v. Webb*, 56 Me. 100, APPLETON, C. J., said: "The only consideration for the note is the liability of the defendant under a contract prohibited by law. But this cannot be regarded as a legal consideration. The rights of the parties remain as if no note had been given. The original contract, being void, was not susceptible of ratification." The same rule obtains in Massachusetts, New Hampshire and Connecticut. *Cranston v. Goss*, 107 Mass. 440; s. c., 9 Am. Rep. 45, and cases there cited. In *Finn v. Donahue*, 35 Conn. 216, the facts were substantially the same as here, and it was held that the plaintiff could not recover for the loan, nor in an action of general *assumpsit* upon a demand afterward made, as for money of the plaintiff in the hands of the defendant; that a party could not be permitted to trace his title through an illegal act.

The decisions of this court are clearly in harmony with the weight of authority upon the point here involved, as above indicated. In *Moore v. Kendall*, 2 Pin. 99, the court said: "Admitting the sale of the goods to have been made on Sunday, it by no means follows that it was void for all purposes. There was an actual transfer of property from James Moore to his brother, the plaintiff in error, and it was not possible thereafter for James or his assigns to re-

Troewert v. Decker.

cover it back. * * * The point before us is simply this: whether any man, under any circumstances, can make a valid transfer of property on Sunday. If he cannot, the instructions were right; if he can, they were wrong. I think it would be carrying the rule of law further than the policy of the statute requires and further than the current of decisions on this subject warrants, to deny that such a transfer, when actually completed without fraud, should stand between the parties." Following that decision, this court, in *Hill v. Sherwood*, 3 Wis. 343, held that "a contract or agreement made on Sunday will not be enforced in a court of law." *Melchoir v. McCarty*, 31 Wis. 252; s. c., 11 Am. Rep. 605, is to the same effect, and there, too, there was a subsequent promise. In *Knox v. Clifford*, 38 Wis. 656; s. c., 20 Am. Rep. 28, the case of *Hill v. Sherwood*, is referred to approvingly. In the case before us, unlike *Williams v. Paul*, and *Melchoir v. McCarty*, there was no subsequent express promise, written or oral, and unlike some of the other cases referred to, there was no subsequent partial payment. Whether in such last mentioned cases an action could be maintained to recover the balance of the loan, it is not necessary here to decide. Confining ourselves to the facts of the case here presented, and without questioning *Melchoir v. McCarty*, we simply desire to hold: (1) The loaning of money on Sunday is "business," within the meaning of the statute, and presumptively illegal. (2) Any party desiring to bring himself within the exception of the statute has the burden of doing so. (3) The mere fact that a person borrowing money on Sunday retains it and converts it to his own use does not raise an implied promise binding in law, and upon which an action can be maintained.

The judgment of the Circuit Court is reversed, and the cause is remanded with directions to enter judgment for the defendant.

Judgment reversed and cause remanded.

Fitzgerald v. City of Berlin.

FITZGERALD V. CITY OF BERLIN.

(51 Wis. 81.)

Municipal corporation — negligence — stairway adjoining sidewalk.

A stairway, parallel to a city street, but outside the limits of the street and sidewalk, led from the sidewalk to a lower level. The opening was properly fenced along the side of the sidewalk. *Held*, that the city were not bound to maintain a barrier or gate at the entrance of the stairway.*

ACTION of damages for personal injury by negligence. The head-note and opinion state the case. The plaintiff had judgment below.

Waring & Ryan, for appellant.

Finch & Barber, for respondent.

LYON, J. It is very frequently essential to the convenient and proper use of hotels and other business houses, sometimes of dwellings, adjacent to streets in cities and villages, that they be constructed with stairways on the street sides, leading downward to the basements and cellars, or upwards to the front entrances of such buildings. Structures of this character, which do not encroach upon the sidewalks, are lawful. The existence of such a structure however imposes upon the municipality in which it is situated the duty of providing proper safeguards to prevent the happening of accidents, by reason of its proximity to the sidewalk, to persons travelling thereon with ordinary care. In the present case the stairway where plaintiff was injured was constructed parallel to and abutting what the defendant claims to be the sidewalk. If it did not encroach upon the sidewalk, we think the defendant city performed its duty by maintaining a sufficient barrier between the sidewalk and the stairway. A barrier, or gate, placed at the entrance to the stairway, would in many, perhaps in most, cases be very inconvenient, and would, or might, seriously interfere with the lawful use of his premises by the owner. On the facts of this case

* See *City of Augusta v. Hafers* (61 Ga. 48), 34 Am. Rep. 95; *Niblett v. Nashville* (13 Bask. 684), 27 Am. Rep. 753, and note, 757.

Kellogg v. Adams.

we think it would be unreasonable to require the municipality to maintain such a safeguard at the entrance to the stairway in question, unless it was within the limits of the sidewalk. The city therefore was guilty of no neglect of duty unless the stairway was within the limits of the sidewalk ordinarily used and travelled by the public; and the jury should have been so instructed. They were not so instructed, but the question whether the city was guilty of negligence was left to them, notwithstanding they should find that the stairway was not within the limits of the sidewalk. This was error. We think the instruction proposed on behalf of the city, quoted in the foregoing statement of the case, is substantially correct, and should have been given.

Several other errors are alleged, but it is not deemed necessary to consider them.

Judgment reversed, and cause remanded for a new trial.

Reversed and remanded.

KELLOGG V. ADAMS.

(51 Wis. 138.)

Gift — from parent to child — revocation.

An executed gift of personal property from a father to his minor child residing in his family is valid and irrevocable, although the property continues in the house occupied by the family.

REPLEVIN for a piano. The piano had been given by the father to his minor daughter, residing with him, and subsequently he mortgaged it, and the mortgagee took possession. The plaintiff had judgment below.

Giffin & Williams, for appellant. A gift *inter vivos* confers title only where there is a positive change of possession and the donor is in no position to recall the gift or repossess himself of the thing given. 1 Pars. on Con. 234; *Little v. Willets*, 55 Barb. 125; *Johnson v. Spies*, 5 Hun, 468; *Trow v. Shannon*, 78 N. Y. 446; *Wilson v. Carpenter*, 17 Wis. 516. A parent may resume property given to an infant child, without the consent of the child. *Crans v.*

Kellogg v. Adams.

Kroger, 22 Ill. 74; *People v. Johnson*, 14 id. 342; *Walton v. Walton*, 70 id. 142; *Carpenter v. Davis*, 71 id. 395; *Wadhams v. Gay*, 73 id. 415; *Hoig v. Adrian College*, 83 id. 267; *Noble v. Smith*, 2 Johns. 53; 3 Am. Dec. 399; *Cook v. Husted*, 12 id. 188; *Clark v. Fitch*, 3 Wend. 459; 20 Am. Dec. 639; *Huntington v. Gilmore*, 14 Barb. 244; *Woodruff v. Cook*, 25 id. 505.

Geo. E. Sutherland, for respondents.

ORTON, J. [A minor point omitted.] On the instructions to the jury, the question is raised, whether O. W. Kellogg, the mortgagor and father of Ida, could make to her a valid and irrevocable gift while she was a minor and member of his family. In order to raise this question, it must be assumed that the gift by the mother was in fact and in law the gift of the father; for the mother has not sought its revocation. This gift is not sought to be avoided by the existing creditors of Kellogg, the father, as having been made in contravention of their rights, but by a subsequent mortgagee of the father, on the ground that the giving of the mortgage was a revocation of the gift. Most of the questions here raised were, in principle, recently decided by this court in the unreported case of *Wambold v. Vick*, referred to by counsel, and such a gift was held valid. In that case the father gave to his minor son his time and services, by means of which the son purchased a piano, and then gave it to his sister. It is creditable to the father, in that case, that he did not himself seek to revoke or defeat his gift. In *Knaggs v. Green*, 48 Wis. 601; s. c., 33 Am. Rep. 838, the validity of a similar gift to an infant is recognized.

It may be difficult to prove an actual delivery and change of possession in such case of gift between members of the same family, when the presumption in all cases is strongly in favor of the continued possession of the father as the head of the family; but it is not impossible; and when such a gift by the father to his child is fully executed by a delivery it will be upheld. The case of *Pierson v. Heisey*, 19 Iowa, 114, is strongly in point and nearly parallel in its facts as to the parties, the subject and the circumstances of the gift. See also Schouler Pers. Prop. 85; *Kerrigan v. Rautigan*, 43 Conn. 17, and other cases cited in brief of counsel. There may be authorities which hold that such a gift may be revoked, but they have not the weight of reason. It is so much more consistent with

Krouskop v. Shontz.

natural feeling, manly honor and paternal affection and fidelity, to uphold such a gift, and prevent a father from doing such an unworthy act as taking back his gift to his child, that we the more readily approve of those authorities which hold that it cannot be done.

The charge of the court was strongly in favor of the plaintiff, but no stronger than the facts seemed to warrant, and, on the whole, presented the case fairly to the jury. The plaintiff being in the possession of the property, and the defendant having taken it away without right, the plaintiff was entitled to recover. *James v. Van Duyn*, 45 Wis. 512.

The judgment of the Circuit Court is affirmed, with costs.

Judgment affirmed.

KROUSKOP V. SHONTZ.

(51 Wis. 204.)

Marriage — married woman's liability for family goods bought on credit of her separate estate.

Under the Wisconsin statute concerning the separate property and business of married women, where a married woman owns a farm, and she and her husband are engaged together in carrying it on, and purchased goods for the use of the family upon the credit of the wife's ownership of the farm, she as well as her husband becomes liable therefor at law, as if unmarried whether the contract is written, oral, or partly written and partly oral.*

ACTION on a note made by a husband and his wife for dry goods for family use, upon the credit of her ownership of a farm which she and her husband carried on together. The plaintiff had judgment below.

Hazelton & Provis and Eastland & Son, for appellants.

O. F. Black and Wm. F. Vilas, for respondent.

CASSODAY, J. [Omitting minor questions.] The other errors assigned were all based upon the theory, that as Mrs. Shontz was a

* See *Williams v. Urmston* (35 Ohio St. 296), 35 Am. Rep. 611, and note, 617; *Elliott v. Gower* (12 R. I. 79), 34 Am. Rep. 600.

married woman, she could not bind herself nor her separate estate by joining with her husband in making the note in question, in consideration of the goods received for the use of the family as stated. If counsel's theory is correct, then the instructions given were clearly erroneous; otherwise not. Prior to the married woman's act, so called, the husband and wife were but one person in law, and the husband was that one. The common law implied not only a unity of person but a unity of interest, and that too was represented by the husband.

In *Conway v. Smith*, 13 Wis. 125, the note was signed by Mrs. and Mr. Smith, and given for work done and materials furnished in the construction of a hotel upon a lot belonging to Mrs. Smith; and a majority of the court, per PAINE, J., held "that our statute did give to married women, as necessarily incidental to the power of holding property to their own use, the power of making all contracts necessary or convenient to its beneficial enjoyment, and that such contracts are to be regarded as valid in law." Page 136. The learned justice then added: "If it be established then that her contracts respecting her separate estate are valid in law, I think it necessarily follows that they may be enforced by legal remedies." The court there however did not go to the extent of holding that the statute gave to a married woman an unlimited power of contracting, and that all her contracts were enforceable by action at law, but only that a limited power of contracting was conferred by the statute, and that such contracts as came within the limitation could be enforced by legal remedies in contradistinction to equitable.

In *Todd v. Lee*, 15 Wis. 365, the action was in equity, to charge the separate estate of Mrs. Lee for the purchase-price of goods sold to her for her use, as a trader in the millinery business, upon the faith and credit of her separate estate. The Circuit Court held that the plaintiffs had no legal or equitable claim against her or her separate estate; but the judgment was reversed by this court, and DIXON, C. J., said; that "the contracts of a married woman, when necessary or convenient to the proper use and enjoyment of her separate estate, are binding at law. *Conway v. Smith*, 13 Wis. 125. All her other engagements stand as before the passage of the statute, good only in equity. The change from an equitable to a legal estate has not, with respect to them, enlarged her powers or removed the disability of coverture; but she remains as if still pos-

Krouskop v. Shontz.

essed of an estate in equity, without restriction as to her power of disposition. * * * The debts in question belong to the latter class. Within all the authorities, the separate estate of a married woman will be charged in equity with the payment of debts contracted for her benefit. In this case we need not inquire further, for that the debts in question were beneficial to Mrs. Lee will readily appear." Page 380. In that case this court approved *Yale v. Dederer*, 18 N. Y. 265, in which the wife signed a note as surety of the husband, and wherein it was held "that a married woman, having a separate estate, might bind it by her general engagements to pay debts contracted for the benefit of such estate, or on her own account, or for her benefit, upon the credit of it." Pages 368, 369. But the court disapproved of *Yale v. Dederer*, 22 N. Y. 450, in which the wife was also a surety on the note of her husband, and wherein it was held, that "in order to create a charge upon the separate estate of a married woman, the intention to do so must be declared in the very contract which is the foundation of the charge, or the consideration must be obtained for the direct benefit of the estate itself." Since that time the statutes of New York have been modified in some respects. We have no design of attempting to reconcile the numerous decisions of the New York courts upon this question, although we have carefully examined several from the Court of Appeals, but rather to preserve the consistency of our own. By way of reference we cite: *Ins. Co. v. Babcock*, 42 N. Y. 613; *Maxon v. Scott*, 55 id. 247; *Manhattan Co. v. Thompson*, 58 id. 80; *Smith v. Dunning*, 61 id. 249; *Yale v. Dederer*, 68 id. 329; *McVey v. Cantrell*, 70 id. 295; s. c., 26 Am. Rep. 605; *Eisenlord v. Snyder*, 71 N. Y. 45; *Bank v. Blake*, 73 id. 260; *Woolsey v. Brown*, 74 id. 82; *Cashman v. Henry*, 75 id. 103; s. c., 31 Am. Rep. 437. Some of these cases are actions at law.

In *Maxon v. Scott* it was held that "the charge of a debt contracted by a married woman upon her separate estate is not a specific lien, but is enforceable against all such property as she may have at the time satisfaction is demanded. A writing is not necessary therefore to create such a charge upon her estate, but it may be created by a parol contract, made upon a good consideration." This was held in a case where a wife engaged board for herself and husband, promising to pay for the same, and to charge her separate estate therefor, and the contract was held binding, and a verdict directed accordingly.

In *Smith v. Dunning* it was held that it was "not necessary to set up in the complaint her coverture, or that she has a separate estate. but the action may be brought and judgment perfected in the same manner and form as if she were a *feme sole*."

In *McVey v. Cantrell* it was held that "where a married woman, having a separate estate, borrows money for the avowed purpose on her part of applying the same to the benefit of her estate, and the loan is made and her promissory note taken for the amount in reliance upon such representation, her estate is liable, and an action may be maintained against her upon the note, although the money borrowed was not in fact applied for the benefit of such estate."

In *Bank v. Blake* it was held that where a married woman indorsed upon a promissory note these words, "I hereby charge my separate and personal estate for the payment of the within note," it did "not constitute a mortgage in any sense," and was "simply personal security," but was nevertheless a "valid agreement on her part, based on a sufficient consideration, and binding."

In *Woolsey v. Brown* it was held that "a married woman is not disqualified from executing as surety an undertaking upon appeal; and where she contracts in such form as to make the undertaking binding upon her estate, and the obligation may be enforced in an action at law, a resort to a court of equity is not required."

In *Cashman v. Henry* a married woman, as grantee, by the terms of her deed assumed and agreed to pay a mortgage upon the premises conveyed, as part of the consideration of the conveyance, and although she had no separate estate prior to such conveyance, and was not engaged in any trade or business on her own account or otherwise, yet she was held to be personally liable to pay the mortgage debt.

Turning to our own decisions, we find that in *Todd v. Lee*, 16 Wis. 480, where the opinion was written by the present chief justice. and the former decision in the case was adhered to, it was held that the charge upon the wife's separate estate became binding, not upon the theory that it constituted a specific lien, but that the "payment of a debt thus contracted by a *feme covert* on the faith of her separate estate will be enforced as well against the separate estate which she may thereafter acquire, as that which she had when the debt was created." That case was followed and approved in *Mehler v. Wise*, 23 Wis. 300.

In *Leonard v. Rogan*, 20 Wis. 540, an attorney brought an action

Krouskop v. Shontz.

against a married woman for services rendered as such attorney, at her request, in reducing to her possession her separate estate, and she was held liable. DIXON, C. J., speaking for the court said: "We think the contract is one which is obligatory upon Mrs. Rogan at law, within the doctrine of *Conway v. Smith* and *Todd v. Lee*. It would also seem to be one of the essential attributes of the unqualified dominion given by statute to a married woman over her separate estate, not only that she should be capable of entering into a contract of his nature with reference to such estate, but that such contract should be binding at law."

In *Meyers v. Rahte*, 46 Wis. 658, the cases of *Conway v. Smith*, *Todd v. Lee*, and *Leonard v. Rogan*, were again expressly approved. So again in *Dayton v. Walsh*, 47 Wis. 113 ; s. c., 32 Am. Rep. 757.

In the leading case of *Hulme v. Tenant*, 1 Brown's Ch. 16, decided by Lord Chancellor THURLOW more than a hundred years ago, the wife signed a bond jointly with her husband. It was held in equity of course, "that the general engagement of the wife shall operate upon her personal property, shall apply to the rents and profits of her real estate, and that her trustees shall be obliged to apply personal estate, and rents and profits, when they arise, to the satisfaction of such general engagements." Page 20.

In the late case of *Johnson v. Gallagher*, 7 Jurist. N. S. 273, *Hulme v. Tenant* is "considered as a resting place" (p. 278), and upon a review of the subsequent authorities, is followed, and upon the strength of it and them Sir G. J. TURNER, L. J., giving the opinion of the court, said: "When a man contracts a debt, both his person and property are by law liable to the payment of it. A court of equity, having created the separate estate, has enabled a married woman to contract debts in respect of it. Her person cannot be made liable either in law or in equity, but in equity her property may. This court therefore, as I conceive, gives execution against the property, just as a court of law gives execution against property of other debtors." Page 279. This case is not referred to in *Conway v. Smith* nor *Todd v. Lee*, but the case of *Hulme v. Tenant*, and subsequent English cases upon which it was based, were cited in both, for the purpose of showing that the statute only empowered a married woman to bind herself at law as she formerly bound herself in equity. The decisions of the different States may not be particularly valuable to this discussion, since

the statutes in the several States differ more or less from our own ; but we apprehend that the statutes in but few States go further than ours.

In *Deering v. Boyle*, 8 Kans. 525; s. c., 12 Am. Rep. 480, the case of *Yale v. Dederer*, 22 N. Y. 450, is disapproved, and in the language of VALENTINE, J., "the able and exhaustive opinion of DIXON, C. J., in the case of *Todd v. Lee*," and the English case are approved; and the court went further, and held that "when a married woman executes a promissory note in payment and satisfaction of her husband's debt, an action may be maintained against her on said note, and her separate property applied in payment of the same, even without showing that it was intended to charge such estate." That case was followed in *Wicks v. Mitchell*, 9 Kans. 80.

In *Phillips v. Graves*, 20 Ohio St. 371 ; s. c., 5 Am. Rep. 675, the case of *Hulme v. Tenant*, several of the subsequent English cases, and *Todd v. Lee*, are referred to approvingly, and it is held that "a married woman possessed of a separate estate * * * may charge the same with her debts, at least to the extent that such debts may be incurred for the benefit of her separate estate or for her own benefit upon the credit of her separate property. Such power is incident to the absolute ownership of property, and is limited only by the terms of the instrument creating the separate estate, or by implication arising therefrom. Her intention to charge her separate property, at the time the debt is incurred, may be either expressed or implied. Such intention may be inferred from the fact she executed a note or other obligation for the indebtedness."

In *Kimm v. Weippert*, 46 Mo. 532 ; s. c., 2 Am. Rep. 541, it was held that a "*feme covert* is absolutely a *feme sole* with respect to her separate estate when she is not especially restrained, by the instrument under which she acts, to some particular mode of disposition. The *jus disponendi* is incident to her separate estate, and follows it by implication."

In *Bank v. Taylor*, 62 Mo. 338, it was held, that "in reference to her separate estate, a married woman is treated as a *feme sole*; and the giving of a note or making of a written contract by her raises the presumption that she intends to bind such estate, and the contrary cannot be proved by parol."

In *Jones v. Glass*, 48 Iowa, 345, it was held, that "the wife is personally liable with her husband for the expenses of the family, and a personal judgment may be rendered against her therefor, in

Krouskop v. Shontz.

a joint action against her and her husband, notwithstanding her husband may have been discharged in bankruptcy."

In *Lake v. Dillard*, 55 Miss. 63, it was held, that "where supplies purchased by either the husband or the wife are used on the plantation cultivated by the wife, whether the same belongs to her in fee-simple or otherwise, or is merely occupied by her for a term of one or more years, her separate estate is liable for the debt contracted for such supplies."

In *Radford v. Carwile*, 13 W. Va. 572, the decision of the court in *Todd v. Lee* is followed, and after quoting at length from the opinion of Judge DIXON, the same is declared to be "substantially sound." Page 625.

In *Wilder v. Ritchie*, 117 Mass. 382, it was held that a note given by a married woman for a loan of money upon the faith and credit of her separate estate was binding upon her, even if the lender knew that the money was to be used by her for the benefit of her husband.

In *Andrews v. Mathews*, 124 Mass. 109, it was held, under the statute of 1874, authorizing a married woman to make contracts in the same manner as if she were sole, that "a promissory note made by a married woman jointly with her husband, for no other consideration than a debt of his to the payee, binds her." Under the same statute, it was held in *Kenworthy v. Sawyer*, 125 Mass. 28, that the wife of one of the partners of a firm could bind herself by indorsing a note for the accommodation of the firm.

With this array of authorities, it will not be expected that this court will take any backward steps. The rules of construction adopted in *Conway v. Smith*, *Todd v. Lee*, and other cases in this court, must be adhered to. The statutes in force, when those decisions were made, are found substantially in sections 2340-2342, R. S., and they in effect empowered a married woman to take and hold real and personal property to her sole and separate use, and to convey and dispose of the same, and any interest or estate therein, "in the same manner and with like effect as if she were unmarried." In the apt language of PAINE, J., in *Conway v. Smith*, "this power," to take, hold, convey and dispose of property, under the law as it then stood, was justly held to "carry with it, as an incident, the power of making such contracts as are necessary or convenient to the enjoyment of the property so held." Page 130. The learned judge continued: "The conclusion seems to me inevitable, that when the law

restored to married women the power of taking and holding property as if unmarried, it gave, as a necessary incident thereto, the power of contracting with respect to it. I suppose it would not be disputed that if the latter power is a necessary incident of the former, then it passed by the grant of the former, without being expressly mentioned. But * * * the equity doctrine * * * bears with its whole weight in favor of the proposition that the power of contracting with respect to it is a necessary incident of the power to hold and enjoy a separate estate. They therefore who deny that this statute gave her the power to contract, must impute to the legislature the unreasonable intention of withdrawing her property from her husband's control and placing it wholly under her own, and yet withholding from her all the means necessary to its beneficial enjoyment." Page 131. "It cannot be assumed that the lawmakers intended to rely on equitable aid to help out the objects of the statute. That would be to say that they intended to make a law that should be insufficient to accomplish its own purposes. No. It must be assumed that they intended to attain their objects by law, and not by equity without law." Page 132. "I am compelled to say therefore that our statute did give to married women, as necessarily incidental to the power of holding property to their own use, the power of making all contracts necessary or convenient to its beneficial enjoyment, and that such contracts are to be regarded as valid at law." Page 136.

Since those decisions, the legislature of this State have greatly enlarged the powers of married women. Chapter 155 of the Laws of 1872, embodied substantially in sections 2343 and 2345, R. S., provided that "the individual earnings of every married woman" become "her separate property," and "every married woman may sue in her own name, and shall have all the remedies of an unmarried woman in regard to her separate property or business, and to recover the earnings secured to her, and shall be liable to be sued in respect to her separate property or business, and judgment may be rendered against her, and be enforced against her and her separate property in all respects as if she were unmarried."

In construing these sections, this court, following the rules of construction laid down in *Conway v. Smith*, *Todd v. Lee* and *Leonard v. Rogan*, in *Meyers v. Rahte*, 46 Wis. 655, per LYON, J., held that "a married woman is entitled to her own earnings, including the profits of a business carried on by her with capital which is her

Krouskop v. Shontz.

sole and separate property, and may make contracts in respect thereto as if she were sole, enforceable by or against her in legal actions." This was a suit in equity to have claims declared a specific lien, but it was held on demurrer that the suit could not be maintained, for the reason that the plaintiff's remedy was "at law, and not in equity."

In *Dayton v. Walsh*, 47 Wis. 113; s. c., 32 Am. Rep. 757, the opinion was written by the present chief justice, and *Meyers v. Rahte*, *Conway v. Smith*, and other cases in this court, were followed and approved, and under the statute as it now stands it was held, that the crops raised upon a farm purchased by the wife entirely on credit (she at the time having no separate estate), by the joint labor and management of herself and husband, were the property of the wife, and not subject to sale for the husband's debts. In the discussion of the subject, the chief justice said: "Does not the law allow her to buy these things on credit, or acquire a separate estate by her earnings? It seems to us it does. It is but another application of the same principle to permit her to lease or buy a house on credit, in which she may keep a private school, or earn money in keeping boarders; or to permit her to buy a farm in the same manner, and raise stock or grain, and thus acquire a separate estate. It is in perfect accord with the spirit of all the legislation in regard to the property rights of married women, to enable her to do these things. These statutes are remedial in their character; intended to remove the disabilities which the common law attached to married women, and were designed to enable them to have, hold and acquire property which they could call their own, and to earn something for themselves by skill and labor. They are therefore to be liberally construed to secure the object of their enactment." Page 120.

This view of the statute would seem to be eminently sound. When we reflect that married women were possessed of separate estates long prior to the statutes, and that her contracts in reference to the same were enforceable in equity, the object of the statute becomes apparent. Before the statutes, her personality and rights of property were, in law, merged in her husband. She was under a ban where courts of law could recognize neither the one nor the other. It was necessary for the more delicate vision of equity to penetrate the covering and discover what, in good conscience, was hers, and then with its more flexible appliances, aid

her in the execution of her wish. In a sense she was the ward of the chancellor. The object of the statute obviously was not to enable her to do in equity what she could do before, but rather to partially restore to her that power and individuality, which, in the eyes of law, she had lost by entering into the marriage relation. It enabled her to dispense with trustees and indirect and complicated methods of business, and within the scope of the statute, to act for herself and in her own name by simple and direct methods, which are recognized in courts of law, "in all respects as if she were unmarried." Within the limitation of the statute, the law applicable to unmarried woman is thereby made applicable to married women. The theory of the statute is not so much a creation of power which she never possessed, as a partial restoration of the power which she is supposed to have lost.

We therefore conclude that (1), where a married woman owns a farm, and herself and husband are engaged together in the "business" of carrying on the same, and they purchase goods for the use, benefit and enjoyment of themselves and family upon the credit of such property being her separate estate, she as well as her husband thereby becomes liable therefor in an action at law in all respects as if she were unmarried; (2) And this is so, whether the evidence of the contract is wholly written or wholly oral, or partly written and partly oral; (3) The rights, powers and remedies expressly given to a married woman by the statute, include within them, by necessary implication and as incident thereto, the legal right and power of doing such things, making such contracts and resorting to such remedies as are necessary or convenient to the beneficial enjoyment of the rights, powers and remedies thus expressly given.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

ORTON, J., dissents.

Bentley v. Doggett.

BENTLEY v. DOGGETT.

(51 Wis. 224.)

Agency — travelling salesman — evidence — custom.

A travelling salesman and collecting agent of a Chicago mercantile house, who was paid a certain salary and his travelling expenses, hired horses and carriages in Wisconsin necessary for use in his employers' business, upon their credit, but neglected to pay for them. On settlement with the agent, his employers allowed him for the hire of such horses and carriages, in ignorance that he had not paid it. Subsequently the owner sued them for the hire, and the defendants offered proof of a general commercial custom at Chicago to furnish such travelling salesmen with sufficient money for all expenses, and to forbid their pledging the credit of their employers therefor. This was excluded. *Held*, no error. The defendants also offered to prove such furnishing and prohibition in this instance. This was also excluded. *Held*, no error, the owner of the horses and carriages being ignorant of it. (*See note, p. 880.*)

ACTION on account for livery. The head-note and opinion show the facts. The plaintiff had judgment below.

W. H. Beebe and A. R. Bushnell, for appellants.

William E. Carter, for respondent.

TAYLOR, J. It is clearly shown by the evidence that it was not only convenient but necessary for the agent, Otis, to have the use of horses and carriages in order to transact the business he was employed to transact; and the only question is, whether he could bind his principals by hiring them upon their credit. Otis was the agent of the defendants for the purpose of travelling about the country with samples of their merchandise, contained in trunks, which rendered it necessary to have a team and carriage to transport him and his samples from place to place, with full authority to sell their merchandise by sample to customers, and direct the same to be delivered according to his orders. The defendants not having furnished their agent the necessary teams and carriages for transportation, he clearly had the right to hire the same and pay their hire out of the funds in his hands belonging to them. This is admitted by all parties. The real question is, can the agent, having the money of his principals in his possession for the purpose of paying such hire, by

neglecting to pay for it, charge them with the payment to the party furnishing the same, such party being ignorant at the time of furnishing the same that the agent was furnished by his principals with money and forbidden to pledge their credit for the same?

There can be no question, that from the nature of the business required to be done by their agent, the defendants held out to those who might have occasion to deal with him, that he had the right to contract for the use of teams and carriages necessary and convenient for doing such business, in the name of his principals, if he saw fit, in the way such service is usually contracted for; and we may perhaps take judicial notice that such service is usually contracted for, payment to be made after the service is performed. It would seem to follow that as the agent had the power to bind his principals by a contract for such service, to be paid for in the usual way, if he neglects or refuses to pay for the same after the service is performed, the principals must pay. The fault of the agent, in not paying out of the money of his principals in his hands cannot deprive the party furnishing the service of the right to enforce the contract against them, he being ignorant of the restricted authority of the agent. If the party furnishing the service knew that the agent had been furnished by his principal with the money to pay for the service and had been forbidden to pledge the credit of his principals for such service, he would be in a different position. Under such circumstances, if he furnished the service to the agent, he would be held to have furnished it upon the sole credit of the agent, and he would be compelled to look to the agent alone for his pay. We think the rule above stated as governing the case is fully sustained by the fundamental principles of law which govern and limit the powers of agents to bind their principals when dealing with third persons. Judge STORY, in his work on Agency, section 127, says: "The principal is bound by all acts of his agent within the scope of the authority which he holds him out to the world to possess, although he may have given him more limited private instructions unknown to the persons dealing with him." In section 133 he says: "So far as an agent, whether he is a general or special agent, is in any case held out to the public at large, or to third persons dealing with him, as competent to contract for and bind the principal, the latter will be bound by the acts of the agent, notwithstanding he may have deviated from his secret instructions." And again, in section 73, in speak-

Bentley v. Doggett.

ing of the power of an agent acting under a written authority, he says: "In each case the agent is apparently clothed with full authority to use all such usual and appropriate means, unless upon the face of the instrument a more restrictive authority is given, or must be inferred to exist. In each case therefore as to third persons innocently dealing with his agent, the principal ought equally to be bound by acts of the agent executing such authority by any of those means, although he may have given to the agent separate private and secret instructions of a more limited nature, or the agent may be secretly acting in violation of his duty. In the case of *Pickering v. Busk*, 15 East, 38-43, Lord ELLENBOROUGH, speaking of the power of an agent to bind his principal, says: "It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect to the subject-matter; and there would be no safety in mercantile transactions if he could not." These general principles have been illustrated and applied by this and other courts in the following cases: *Young v. Wright*, 4 Wis. 144; *Whitney v. State Bank*, 7 id. 620; *Long v. Fuller*, 21 id. 121; *Houghton v. Bank*, 26 id. 663; s. c., 7 Am. Rep. 107; *Kasson v. Noltner*, 43 Wis. 646; *Smith v. Tracy*, 3^d N. Y. 79; *Andrews v. Kneeland*, 6 Cow. 354.

In this view of the case it was immaterial what the orders of the principal were to the agent, or that he furnished him money to pay these charges, so long as the person furnishing the services was in ignorance of such facts. In order to relieve himself from liability, the principal was bound to show that the plaintiff had knowledge of the restrictions placed upon his agent, or that the custom to limit the powers of agents of this kind was so universal that the plaintiff must be presumed to have knowledge of such custom. Under the decisions of this court, the custom offered to be proved was not sufficiently universal to charge the plaintiff thereof. See *Scott v. Whitney*, 41 Wis. 404, and the cases cited in the decision, and *Hinton v. Coleman*, 45 id. 165. And there being no proof of actual notice to the plaintiff, the only issue left in the case, which was not clearly disposed of in favor of the plaintiff by the evidence, was submitted to the jury, viz.: whether the credit was in fact given by the plaintiff to the agent or to the firm. The jury found against the defendants upon this issue.

[Omitting question of weight of evidence.]

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Redmon v. Phoenix Fire Insurance Company.

NOTE BY THE REPORTER — In *Linn v. Gilman*, Michigan Supreme Court, October, 1881, the plaintiff employed defendant as his travelling agent to make sales and collections for a salary and expenses borne. Defendant continued in this employment from 1871 to 1873. The course pursued by mutual acquiescence and assent was for the defendant to make trips occupying a few days and on his return report a gross sum as paid for expenses and hand over the remainder. About the middle of 1875 the plaintiff informed him that his expenses were regarded as too large, and in the next year they footed up a little less. Plaintiffs did not call at any time for a revision of charges or suggest any suspicion against their integrity. In 1879, after the employment had ceased, this action was brought to recover what it was claimed that defendant had received from plaintiff by reason of being allowed fictitious additions to his expenses for moneys that he had not expended for travelling purposes. At the trial plaintiff proposed to show by a number of travelling men upon the route mentioned, what the expenses of travelling that route were for the different years involved, and by merchants who had travellers, that the expenses were less than those charged by the defendant. This evidence was not admitted. *Held*, no error. While the collateral facts are often relevant and proper it is necessary to regard their relation to the question to be settled. There must always be some known and ordinary connection between the facts proposed and the facts to be proved, and the former must have some fair tendency to establish the truth of the latter, and when the collateral facts consist of the conduct of strangers the law usually applies the maxim of *res inter alios acta*, because there is no such general connection between such acts and the matters to be established as will justify an inference such as may properly be relied on in judicial investigations. But whether these foreign facts are or are not the acts of strangers, if they are incapable of affording any reasonable presumption or inference as to the final subject, they ought not to be admitted. They are likely to lead to multiplication of issues and to cause confusion and misjudgment. 1 Greenl. on Ev., § 52; 1 Stark. 79, 80, 81, 82; Stephens, art. 10. Illustrations of the doctrine referred to are numerous. The following citations are among them: *Holcombe v. Hewson*, 2 Campb. 391; *Jackson v. Smith*, 7 Cow. 717; *Wilmot v. Richardson*, 6 Duer, 828; *Murray v. Smith*, 1 id. 412; *Lewis v. Smith*, 107 Mass. 384; *Aldrich v. Inhabitants of Pelham*, 1 Gray, 510; *Collins v. Inhabitants of Dorchester*, 6 Cush. 896; *Lincoln v. Taunton Manufacturing Co.*, 9 Allen, 181; *Gouge v. Roberts*, 53 N. Y. 612; *Lake v. Clark*, 97 Mass. 846; *Odiorne v. Micklej*, 2 Gall. 51-53; *Brewster v. Dennis*, 21 Pick. 237; *Furneaux v. Hutchins*, Cowper, 807.

REDMON V. PHOENIX FIRE INSURANCE COMPANY.

(51 Wis. 293.)

Insurance — fire — "incumbrance" — mechanics' lien.

A mechanics' lien is an "incumbrance" within the meaning of a warranty against "incumbrances" in a fire insurance policy.

ACTION on fire insurance policy, warranty against incumbrances.
The plaintiff had judgment below.

J. W. Lusk, for appellant.

J. S. White, Vilas & Bryant, Wm. F. Vilas, for respondent.

Redmon v. Phoenix Fire Insurance Company.

CASSODAY, J. [Omitting a minor consideration.] This brings us to the question whether a mechanic's lien is an incumbrance. It is in effect conceded by counsel for the respondent, "that a covenant against incumbrances in a conveyance of land is a guaranty against the existence of any charge upon it, which will compel the grantee to pay money to relieve the land," and hence includes a mechanic's lien, but it is insisted that in this application "the word 'incumbrance' is used in its popular and not its technical sense." No case has been cited making such distinction in the use of the word "incumbrance." Webster defines an "incumbrance" to be "a burdensome and troublesome load ;" and again "a burden or charge upon property ; a legal claim or lien upon an estate." It will hardly be claimed that Webster did not define the word for the use of the populace, or that he only intended such definition to include mortgages. Certainly, judgments duly rendered and docketed must be regarded as incumbrances, as used in popular speech. Is not the same true with respect to a mechanic's lien? It would seem to be impossible to conceive of any motive which would induce an insurance company, at the time of an application for insurance, to ask whether there were any incumbrances on the property by way of mortgage, which would not be equally controlling as to incumbrances by way of judgment or mechanic's lien. All such incumbrances affect what counsel called the "moral hazard." In this respect, such incumbrances are wholly unlike a highway or right of way. It is true, as stated by counsel, that "the existence of an incumbrance adds nothing to the risk of accidental or honest loss," but it is not so certain that it "can in no case take any thing from the insurer." If it be conceded that every loss is "accidental or honest," then it might be true. But many of the stipulations and statements required in the applications for insurance are to secure risks in which there shall be no motive for intentional or dishonest loss. Obviously, the inducement to bring about loss by fire would be far greater in one who is insolvent, having an insurance upon property incumbered for more than it is worth, than in one free from debt and perfectly responsible. Such questions, put to the applicant for insurance, are obviously to secure a declaration from him that he at the time is free from any temptation to bring about an intentional loss, in case the company issues the policy. It is not a prayer, but rather a declaration, forced by the company, to the effect that the assured will not be led into temptation by the issuing of the policy.

Redmon v. Phoenix Fire Insurance Company.

Such being the motive for putting the question, it would seem to be difficult in this case to so construe the language as to hold that the company merely intended to ask, and the assured merely intended to answer, concerning incumbrances by way of mortgage, and no other incumbrances.

No reported case has been cited involving the precise question here presented, nor any affirming the distinction in the use of the word incumbrance here claimed; and it seems to us that such a distinction would be extremely technical and over-nice, if not forced. The statute provides that "every person who, as principal contractor, performs any work or labor, or furnishes any materials, in or about the erection, construction, etc., * * * of any dwelling house or other building, or of any machinery erected or constructed so as to be or become a part of the freehold upon which it is situated, * * * shall have a lien thereupon, and upon the interests of the owner of such * * * building, machinery, etc., * * * in and to the land upon which the same is situated, or of the person causing such manual labor to be done, * * * and such lien shall be prior to any other lien which originates subsequent to the commencement of the construction * * * of or upon such building, machinery, etc., * * * and may be enforced as provided in this chapter." § 3314, R. S. Under this statute it was held by this court that such lien takes precedence of liens of any other kind (as by mortgage, judgment, and the like) attaching subsequently to the commencement of the building, and that where there are several persons claiming liens under said statute, their order of priority among themselves is determined by the dates of the filing of their respective petitions. *Hall v. Hinckley*, 32 Wis. 362.

The plaintiffs, as well as all other persons coming within its provisions, were conclusively presumed to know the contents of the statute. Assuming, as we must for the purposes of this appeal, that the defendants could have proved all they offered to prove, then, such being the facts, the plaintiffs were conclusively presumed to know that the same constituted a valid subsisting incumbrance of several thousand dollars upon the mill by reason of the lien so given by the statute; and knowing such facts and knowing of the Copp mortgage, they were asked by the company, "What incumbrance, if any, is now on said property?" and they answered, \$5,000, whereas the Copp mortgage alone amounted to that. But it was stated on the argument that such a construction might avoid a large

Lefebvre v. Dutruit.

per cent of existing policies ; that any person, however responsible, was liable to forget unpaid bills for recent repairs upon his dwelling houses, and without thinking of the statutory lien therefor, apply for an insurance, and honestly state in the application that there was no incumbrance thereon, and yet, technically speaking, the answer might be untrue. The suggestion is pertinent, and we have fully considered it. But this is not such a case; and besides, courts are not organized to make, nor regulate the making of, contracts between parties, nor to relieve parties from provisions in contracts on the ground that in their opinion in some conceivable case they might operate harshly. It is for parties to make their own contracts, under such regulations as the legislature may prescribe. Courts must be content with construing and enforcing contracts according to law. We therefore hold that a subsisting mechanic's lien, for which a petition was filed, is an incumbrance within the ordinary meaning of the word.

Judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

Reversed and remanded.

ORTON, J., took no part.

LEFEBVRE V. DUTRUIT.

(51 Wis. 336.)

Dures — of wife.

A public defaulter disclosed his situation, and his liability to criminal prosecution to his wife, and urged her to mortgage her property to secure his sureties. He had not been threatened with criminal prosecution by them, nor did he represent to his wife that he had been; but he told her that sooner than go to jail he would kill himself. She executed, acknowledged and delivered the mortgage without final objection, after several days' hesitation and importunity. The mortgagees had no knowledge of her reluctance. *Held*, a valid mortgage.*

ACTION to foreclose a mortgage. The opinion states the case. The plaintiff had judgment below.

*To same effect, *Wright v. Remington*, (12 Vroom. 48), 32 Am. Rep. 180, and note, 186 affirmed, 14 Vroom. 151; *Smith v. Allis*, 52 Wis. 337.

G. W. Cate, for appellant.

Webb & Cochran, for respondent.

LYON, J. It is essential to a correct determination of this appeal to ascertain the circumstances under which the mortgage in suit was executed and the influences which were brought to bear upon Mrs. Dutruit to induce her to execute it.

The mortgage was given about December 30, 1876. It had then been ascertained that Dutruit was a defaulter to the county in the sum of \$6,000, and the mortgagees, who were his sureties and liable therefor, were naturally anxious to obtain some indemnity against such liability. Negotiations were thereupon had between the mortgagees and Dutruit, which resulted in an agreement for the execution of the notes and mortgage in suit. Mrs. Dutruit was entirely willing to mortgage all of her real estate except her homestead, to help her husband out of his difficulties; but she objected to having her homestead included in the mortgage. The alleged value of the homestead is \$2,000; of all the property mortgaged, \$12,000. For several days and nights Dutruit pressed his wife to sign the mortgage. He told her of his trouble, and that he was liable to be prosecuted criminally. He said that before he would go to jail he would shoot himself through his brains; that there was no other way — she *must* sign it. She then signed the mortgage. She testified: "I had such a fear that something wrong would happen, that I finally consented to it." Mr. and Mrs. Dutruit alone are the witnesses to what passed between them, and necessarily so, because no other persons were present when the transactions occurred. After Mrs. Dutruit signed the mortgage, her husband took it to Dr. Hurley, a justice of the peace, to have the execution thereof perfected. The justice thereupon proceeded to the residence of Mrs. Dutruit, taking with him one Massey for an additional attesting witness, and presented the mortgage to her. She took the mortgage, examined it several minutes, admitted that the signature thereto was written by her, and said to the justice that she knew all about the mortgage, and it was all right. The justice then took the mortgage and placed it in his pocket, and he and Massey retired. He afterward delivered the mortgage, duly attested and with the usual certificate of acknowledgment written thereon, to Dutruit, who delivered it to the mortgagees. There

Lefebvre v. Dutruit.

may be a little testimony controverting some of the above facts, but we think they are all established by a clear preponderance of evidence. There is evidence tending to prove, that soon after the justice and Massy left the presence of Mrs. Dutruit, they met Dutruit and one Rossier, his brother-in-law, and at their request the justice returned with them to Mrs. Dutruit; that they had some conversation before they returned as to the questions the justice put to her, and after they returned, either the justice or another of those present asked her if she was forced to sign the mortgage, and she replied "Yes." Also that she replied in the negative to the question, "Did you sign that mortgage of your own free will and accord?"

The justice denies any talk about the mode of acknowledgment, and says they called him back into the house, and Rosier asked Mrs. Dutruit whether she signed that instrument or writing," and she replied "Yes." He then asked her: "Were you forced to sign that mortgage?" and she replied, "I was forced to sign it." It does not appear that the mortgage was produced on that occasion, or that Mrs. Dutruit recalled any of the statements previously made to the justice, or referred to them. Neither does it appear that either of the mortgagees knew, until the answer was interposed (which was over two years later), that Mrs. Dutruit had hesitated, or made any objection whatever to executing the mortgage; or that either of them was aware that any pressure had been brought to bear upon her by her husband to induce her to do so. He testified that he concealed from the plaintiff the fact that his wife objected to signing the mortgage, and told the justice it was all right — that it was with the consent of his wife. Neither does it appear that either of the mortgagees ever threatened a criminal prosecution, or suggested that one might be commenced, or that Dutruit represented to his wife that such prosecution was threatened by any person. Dutruit testified that some one (not the plaintiff) intimated that he might be prosecuted, and she testified that he told her, unless she signed the mortgage, he certainly would be prosecuted as a defaulter. This is substantially all the testimony on the subject.

The foregoing are the material facts in the case. We are to determine whether they are sufficient to invalidate the mortgage. There is no prescribed formula of the acknowledgment of a conveyance. It is sufficient if the grantor, after being fully informed of the contents of the instrument, declare to the officer taking his acknowledgment that he executed the same. In this case Mrs. Du-

truit knew the contents of the mortgage, declared her approval thereof, and acknowledged that she executed the instrument. This is a valid acknowledgment. True, she afterward denied, in the presence of the justice, that she executed it freely, but she did not attempt to cancel or recall the acknowledgment previously made; and it may be doubted whether she could withdraw her acknowledgment after having once made it. After signing the mortgage, Mrs. Dutruit left it in the possession of her husband, and after acknowledging it intrusted it to the justice, who took it away with him without objection on her part. Presumably she did so for the purpose of having the instrument perfected and delivered to the mortgagees. She does not testify to the contrary. We think there was a valid delivery of the mortgage.

There is no evidence in the case tending to show duress of imprisonment, or threats of imprisonment. Dutruit had committed a crime, and was liable to be prosecuted therefor and imprisoned. But it does not appear that any person had threatened to prosecute him, or that his wife had been informed that he was threatened with a criminal prosecution. There is therefore no question of duress to the husband in the case.

The case is equally barren of testimony tending to show duress to the wife. She was not coerced to sign the mortgage. True, her husband said that she must sign it; but it is perfectly obvious from the testimony of both that this was not in any sense a command, and was not so understood by either, but was only a declaration that there was no other way to avert the probable consequences of his crime.

In our opinion therefore the inquiry is narrowed to the single question of undue influence. Was the execution of the mortgage by Mrs. Dutruit procured or induced by the influence of her husband over her, unduly and unlawfully exerted?

No fraud was practiced upon Mrs. Dutruit. No material fact was misrepresented to her or concealed from her. She was told by her husband (as the facts were) that he was a defaulter to the county, and that his defalcation was a crime which exposed him to criminal prosecution and punishment. He undoubtedly hoped, probably believed, that if his wife would execute the mortgage, prosecution and punishment would be averted. He saw no other avenue of escape, and so informed his wife. He explained the situation to her fully and truly, and no doubt gave her his candid opinion of

Lefebvre v. Dutruit.

results should she give or withhold the mortgage. He did not claim or pretend to her that prosecution had been threatened, and it does not appear that any had been threatened. The elements of misrepresentation and concealment, or fraud of any kind, are not in the case. Mrs. Dutruit executed the mortgage with full and accurate knowledge of the situation.

Most undoubtedly her husband importuned her to rescue him from his embarrassments by giving the security. It is apparent that she was willing from the first to pledge all of her property to relieve him, except her homestead, which represented but one-sixth of the value of the whole property mortgaged. She included the homestead in the mortgage reluctantly and regretfully, no doubt, yet knowingly and intelligently.

Hence the question narrows down to this: Is the mere importunity of the husband sufficient to avoid the conveyance of the wife procured by such importunity, in the absence of duress, threats, coercion, oppression or fraud? In stating this question, we do not forget the idle threat of Dutruit, made with such particularity of detail, that "rather than go to prison he would shoot himself through his brains." Mrs. Dutruit does not say that she feared he would commit suicide, and manifestly she did not fear it. The "something wrong" which she testified she feared would happen, evidently referred to a criminal prosecution of her husband and its consequences.

The courts have always jealously scrutinized transactions by which a wife has attempted to pass her separate estate to her husband, or charge it for his debts, and have never hesitated to set aside her conveyance when the same has been obtained by any improper means. The statute which empowers a wife to deal with her separate estate as though she were sole does not call for or justify any relaxation of such scrutiny, or lessen her right to the watchful protection of the courts. In the light of this well-settled and just principle we have carefully examined numerous cases (including many of those cited by the learned counsel for the appellant) bearing upon the question under consideration. In each of the cases examined, in which such a conveyance has been set aside, we find that the same was procured either by duress, actual or threatened, by concealment or misrepresentation of material facts, or some other fraud; by oppression or terror; or by some act or conduct which overcame the will.

Perhaps *Eadie v. Slimmon*, 26 N. Y. 9, is a fair illustration of the general characteristics of that class of cases. Slimmon went to the house of Eadie (the plaintiff's husband), who had been his clerk, accompanied by an attorney and a person whom he represented to be an officer, and charged Eadie with having embezzled his money while in his employment. Slimmon demanded, among other things, that Mrs. Eadie should assign to him a policy held by her on the life of her husband, threatening that if his demand were not complied with Eadie should be arrested at once and taken to prison. Slimmon was imperious in his demands, and with his associates was at the house of Eadie several hours—in fact nearly all night—insisting on compliance and threatening arrest. Mrs. Eadie became almost frantic with grief and terror, and finally assigned the policy. The action was brought to cancel the assignment, and it was cancelled. The ground of the judgment is thus stated in a few sentences: “The assignment from the plaintiff to the defendant was most clearly extorted by a species of force, terrorism and coercion, which overcame free agency; in which fear sought security in concession to threats and to apprehensions of injury. It was made as the only way of escape from a sort of moral duress more distressing than any fear of bodily injury or physical constraint.”

Some of the cases go upon the mental or physical weakness of the grantors, and the fact that the conveyances were made in the absence of proper counsel, and were inequitable. *Watkins v. Brant*, 46 Wis. 419, belongs to this class. See also *Bogie v. Bogie*, 37 id. 373. That case however turned upon the non-delivery of the deed. So in many of the cases, the conveyances were mere gifts to the grantees who were the parties seeking to uphold them; and in these frauds or weakness of intellect, or some other of the elements of invalidity before mentioned, have usually been present.

We find no case however in which mere importunity, unaccompanied with fraud or duress, or circumstances of mistake or oppression, or weakness of intellect, has been held to invalidate a conveyance. Neither are we aware of any legal principle which in such a case will work such a result.

The learned counsel for the appellant maintains that the burden of proof is upon the plaintiff to show affirmatively that the mortgage was freely executed by Mrs. Dutruit. But the question is not here because all the circumstances of its execution are in evi-

Schultz v. Coon.

dence, and it is now immaterial from which side the evidence came.

The fact that Mrs. Dutruit allowed the mortgagees to rest quietly over two years in the faith that they had a valid security is not without significance, but it is not a controlling fact in the case. Hence the effect of such delay will not be considered. Upon the best consideration we have been able to bestow upon the case, we are brought to the conclusion that the mortgage in suit is a valid security. We must therefore affirm the judgment of the Circuit Court.

Judgment affirmed.

SCHULTZ V. COON.

(51 Wis. 416.)

Evidence — to contradict bill of sale — receipt.

An instrument in the form of a receipt for goods, specifying kinds, numbers, prices, and total value, all in the writing of the receiver, and upon which the other party indorses money paid at the time, is a contract of sale, and cannot be varied or explained by parol.

ACTION for goods sold. The opinion states the case. The plaintiff had judgment below.

H. W. Lee, for appellant, cited *Sheldon v. Peck*, 13 Barb. 317; *Colburn v. Lansing*, 46 id. 37; *Ensign v. Webster*, 1 Johns. Cas. 145; *McKinstry v. Pearsall*, 3 Johns. 319; *Woodman v. Clapp*, 21 Wis. 350; *Smith v. Schulenberg*, 34 id. 41; *Clifford v. Baessman*, 41. id. 597; *Ballston Spa Bank v. Marine Bank*, 16 id. 120.

J. Bowman and *S. U. Pinney*, for respondent.

ORTON, J. This action was tried in the Circuit Court on appeal from a justice of the peace. The complaint was substantially for fruit trees and grape roots sold and delivered at the agreed price of \$88.24. The answer admits the receipt of such fruit trees and grape roots, but alleges that they were received to be sold on commission, and that the defendant gave to the plaintiff at the time the following receipt: "Oxford, May 2, 1877. J. H. Coon received

of J. F. Schultz 749 two-year-old apple trees, at eight cents apiece, and 286 three-year-old, at nine cents apiece; 18 Concord grape roots, at six cents apiece; 9 Delawares, at ten cents apiece; 4 Rogers No. 15, at ten cents apiece; 2 Rogers No. 9, at ten cents apiece, also; amounting to, in all, \$88.24;” — and it alleges that five dollars were indorsed thereon. The plaintiff introduced in evidence said receipt as the contract of sale, having indorsed thereon five dollars, and testified that such receipt was the memorandum of the sale made at the time, and that the defendant paid at the same time the five dollars which he (the plaintiff) indorsed thereon, and rested.

The execution of this receipt or memorandum was not in question, for it is admitted in the answer, so that the testimony of the plaintiff as to the signature to it of the defendant, and the testimony offered by the defendant and rejected by the court in respect to such signature, were immaterial. The defendant offered evidence tending to show that such receipt did not contain all of the contract in respect to the receipt by him of said property, and that said property was in fact so received to be sold on commission, and was not purchased by him at the price stated therein. This evidence was objected to on the ground that this instrument, so called a receipt, was a complete contract of sale, which could not be contradicted, varied or explained by parol evidence; and the objection was sustained by the court, and the defendant excepted. This presents really the only question in this case: Is this instrument such a contract? We think it is, and that the Circuit Court properly rejected such evidence.

If instead of the word “received,” the word “bought” had been used, to say that such an instrument, signed by the party to be charged, and accepted by the other party, was not a complete bill or contract of sale, would be mere cavilling; and the word “received” in such an instrument, fixing specifically the price of each article and the sum total of the whole, has the same legal effect as the word “bought,” with the additional acknowledgment of a delivery of the property. It is not a mere receipt, which, by the authorities, is open to explanation, but it has all the requisites of a contract of sale, without any ambiguity or uncertainty. If the defendant here were contending for the title of the property, it would certainly be sufficient evidence of his title to prove that the plaintiff took this receipt and indorsed thereon five dollars as part payment (*Rice v. Cutler*, 17 Wis. 351); then why not sufficient evidence of a sale to

Bast v. Byrne.

enable the vendor to recover the purchase-money? *Bacon v. Eccles*, 43 Wis. 227; *Wellauer v. Fellows*, 48 id. 105. The contract of sale may be in the form of a receipt, and if it is complete as such, it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol. 1 Greenl. on Ev., § 305; *Terry v. Wheeler*, 25 N. Y. 520; *Dunn v. Hewitt*, 2 Den. 637. The authorities cited by the learned counsel of the appellant are inapplicable, because relating to instruments in the form of receipts, wanting in some essential element to make them contracts of bargain and sale, such as the price or other terms of the bargain. Where the meaning of the instrument, as in this case, is plain and unquestionable, and the meaning is not that which the parties have agreed upon, or where there is no uncertainty in its legal effect, it cannot be contradicted or varied by parol evidence. 2 Pars. on Cont., § 563. We find no error in the record.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

BAST V. BYRNE.

(51 Wis. 531.)

Master and servant — lost time by servant.

One agreed to serve another for a year at a gross price. He worked up to the end of the year, but was absent at different times nine days and a half in all. *Held*, that he was entitled to full pay.

ACTION on contract of hire of personal services. The head-note and opinion state the facts. The plaintiff had judgment below.

B. Dunwiddie, A. S. Douglass and S. U. Pinney, for appellant.

P. J. Clawson, for respondent.

CASSODAY, J. There is no dispute but that it was a year from the time the plaintiff began the work until he quit. Had he lost no time, he would have fully complied with his contract. It is urged however that whenever the plaintiff, from his own fault or

necessity, lost any time, it became optional with the defendant to allow him to resume work or not, and that when he did "choose to allow him to resume work," then the plaintiff became bound to make up the days so lost, by working after what would have otherwise been the end of the year. In other words, it is claimed that the clause, "agrees to pay * * * the sum of \$360 for one year," does not refer to a definite period of time, but a definite number of days of service, and that until the number of days of service were in fact rendered, either during the year or subsequently, no recovery could be had upon the contract. In support of this theory we are referred to *Winn v. Southgate*, 17 Vt. 355, and *Lamburn v. Cruden*, 2 M. & G. 253.

In *Winn v. Southgate*, the contract was that the plaintiff should labor six months for the defendant. He commenced work May 17th, and during the term, with the consent of the defendant, was absent on a journey sixteen days, but returned October 5th, and continued to work until October 30th, when he quit, being seventeen days before the end of the six months, and then insisted that his time was out, claiming that twenty-four working days were a month; and thereupon he sued for the balance of his wages, and the court held that he could not recover. It is evident from this statement that the question here involved did not there arise.

In *Lamburn v. Cruden* the plaintiff had been engaged by the defendant at a yearly salary, payable quarterly. The last year of service expired September 29, 1837, and his salary up to that time had been duly paid. Before the expiration of the year, a misunderstanding had arisen. October 20th, the plaintiff tendered his resignation, which was accepted December 13th. In the meantime he had performed no service, except upon one occasion, and then against the assent of the defendant. The action was for services between September 29th and December 13th; but the plaintiff was nonsuited; and the rule for a new trial was made absolute, on the ground that the court should have submitted to the jury the question as to whether there was a new agreement.

The question there involved seems to have been foreign to the question here presented. There the subsequent services were claimed under a new agreement; here subsequent services were demanded by virtue of the old agreement. Of course it was competent for the parties in this case to have made a new agreement, whereby the plaintiff should work a certain number of days in lieu

Bast v. Byrne.

of the nine and one-half days which he had lost; but there is no claim that any such new agreement was ever made, and the question is, Can the court expand an agreement which by its terms was limited to "one year," so as to require a party under it to render services after the expiration of the year, in lieu of certain days of service which he failed to perform during the year? No case has been cited going to that extent, and we have no disposition to furnish one. A party contracting to labor for a limited period cannot be required, after the expiration of the period, to render additional services under such contract, without any new agreement, merely because he had lost certain days during the term.

The court charged the jury on the theory that it was competent for the defendant, during the contract, to waive a strict performance of any particular day's work, and that when the plaintiff, from time to time, lost a day, and the defendant with knowledge of the fact received him back into his employ, it was such a waiver, at least to the extent of preventing the defendant from enforcing a forfeiture of payment for the services actually performed. It is true, the charge in this respect is not very full or explicit; but if the defendant desired to have it more definite he should have so requested. We are convinced that the theory upon which the cause was submitted to the jury was correct. Such acts of the defendant, without objection, we regard as a *prima facie* waiver of the breach. They presume condonation. The loss of a half day, a day, or two days, at intervals, and long prior to the termination of the contract, without objection on the part of the defendant, should not upon principle operate so harshly as to work a forfeiture of payment for services subsequently rendered in good faith, and with no notice that such forfeiture would be insisted upon. There may be adjudged cases going to that extent, but we should be very slow to follow them. In *Ridgway v. Hungerford Market Co.*, 3 Ad. & El. 171, Lord DENMAN, C. J., declared that where the servant was guilty of misconduct in June, and the master knowing it, retained him until November, "a condonation might be presumed." This was *dictum*, to be sure, but we think it was good law. In *Prentiss v. Ledyard*, 28 Wis. 131, although the contract was for no definite time, yet it was held, that "where the employee was to receive payment at a specified rate if he continued temperate and faithful in the employer's service, the fact that he was occasionally intemperate and discontinued the service for short periods would not prevent

his recovering the stipulated rate for the time actually spent in such service, if he was received back into it and continued therein without any new arrangement being made, or any intimation given that the old one was terminated." We see no difference in principle between the waiver of the conditions of a contract in respect to personal habits, and in respect to interruptions of service, or any other stipulation. The question of waiver of the breach by the retention of the employee for eleven or twelve days after the master's knowledge of the existence of the causes, was held properly submitted to the jury in *McGrath v. Bell*, 33 N. Y. Super. 195. It is certainly equitable, and we think, according to well-established principles of law, to hold that where an employee for a fixed period, without any fault of his employer, absents himself for a short time, and then the employer, with the knowledge of the fact, receives him back into his service without objection, and retains him until the termination of the contract, he thereby waives the right to declare the contract forfeited as to the services actually rendered. This is not going as far as the opinion of the court in *Britton v. Turner*, 6 N. H. 481. It is true, that case has frequently been disapproved, but it is also true that it has been frequently approved. *Elliott v. Heath*, 14 N. H. 131; *Laton v. King*, 19 id. 280; *Davis v. Barrington*, 30 id. 517; *Pixler v. Nichols*, 8 Iowa, 106; *Byerlee v. Mendell*, 39 id. 382, and cases there cited, in which last case it was held that "where a party hires himself to another for a fixed period of time, and leaves the service before the expiration of the term without any fault on the part of the employer, the former may recover the value of his services performed as upon a *quantum meruit*, without showing that he left the service of his employer for good cause." *Britton v. Turner* was also followed in *Fenton v. Clark*, 11 Vt. 560; *Gilman v. Hall*, id. 510; *Blood v. Enos*, 12 id. 625. There are strong equitable reasons to sustain the doctrine of the above cases; but they would seem to be in conflict with the weight of authority, and we therefore cite them merely because they furnish strong reasons in favor of the conclusions which we have reached in this case.

[Omitting minor considerations.]

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Smith v. State.

SMITH V. STATE.

(51 Wis. 615.)

Criminal law — verdict — presence of prisoner's counsel at.

Where a verdict of guilty in a case of felony is received in the absence of the prisoner's counsel without his fault, and the right to poll the jury is thus lost, it is ground for a new trial.*

CONVICTION of rape. The opinion states the facts.

Ives & Matthews, for plaintiff in error.

The Attorney-General, for State.

TAYLOR, J. The plaintiff in error was tried and convicted upon an information charging him with rape. After verdict, and before judgment, the plaintiff in error moved the court to set aside the verdict and grant a new trial upon the following grounds: Upon the exception taken to the introduction of evidence; that the verdict is against the evidence; that the defendant's counsel had not been given an opportunity to be present at the coming in of the jury and delivery of the verdict; and that the jury had been discharged before the rendering of the verdict. Upon this motion the defendant submitted the affidavits of his attorneys, showing that they desired to be present at the time of the rendition of the verdict; that the jury retired to consider upon their verdict at about nine o'clock in the evening, and thereupon the court adjourned until nine o'clock the next morning; that defendant's counsel remained in the court room until about eleven o'clock in the evening, and the jury having failed to agree at that time, the defendant's counsel retired to his office, a short distance from the court-house, and went to bed; that between six and seven o'clock in the morning the jury came in with their verdict, which was received by the court, and the jury discharged; that no notice was given to the attorneys for the defendant that the jury had agreed, or had brought in their verdict, at or before the time said verdict was received by the court and the jury discharged; and that they did not learn

* *Contra, Beaumont v. State* (1 Tex. Ct. App. 533), 28 Am. Rep. 424.

that any verdict had been rendered until the opening of the court at nine o'clock in the morning. The defendant also submitted the affidavit of the deputy sheriff in attendance upon the court, showing that he made no attempt to notify the counsel of the coming in of the jury in said action, and was told by the honorable Circuit judge presiding at such trial, before the coming in of the jury, that on their coming in he need not notify the defendant's counsel. The record further shows that when the jury came in to render their verdict, the under-sheriff asked the judge if he should go for the defendant's counsel, and the judge replied, "No ; it is not necessary." The motion to set aside the verdict and grant a new trial was denied, and the defendant excepted, and final judgment and sentence were pronounced against the defendant. The record also shows that upon the opening of the court, at nine o'clock in the morning, the defendant's counsel appeared and demanded to have the jury polled, which was refused by the court.

In this court the counsel for the plaintiff in error assigns for error the same reasons assigned upon his motion to set aside the verdict.

[Omitting minor matters.]

The learned counsel for the plaintiff in error insist that the court committed an error in refusing to set aside the verdict on the ground that the counsel for defendant were not present when the verdict was received, and were not notified to be present, but on the contrary, the court instructed the sheriff's officer, who was in attendance and could readily have notified counsel, that it was unnecessary to do so. The record, we think, shows that the defendant's counsel were not voluntarily absent when the verdict was received, and also that they were desirous of being present at that time. The counsel who tried the case remained at the court-house several hours after the jury had retired, and until a late hour at night, waiting for the jury to return their verdict. He then went to his office, near by, and went to sleep. The verdict was received early in the morning, and before the court was opened. In such case we think the counsel had the right to expect he would be notified that the jury were ready to return their verdict, if the same was rendered before the meeting of the court in the morning, and that it would be unjust to hold, that by his retiring from the court-house at a late hour of night, he had waived his right to be present when the verdict was received during the recess of the court. If,

Smith v. State.

by the absence of the defendant's counsel at the time of receiving the verdict, the defendant lost any right which might have been beneficial to him, then we think it was error not to grant a new trial for that reason. It is insisted that he lost the right to poll the jury. If he did, then he lost a right which was very important to him. That a defendant, in either a civil or criminal action, has the right to poll the jury, is well settled; and a refusal to permit him to do so is error, for which the verdict will be set aside. *Webster v. McKinster*, 1 Pin. 644; *State v. Austin*, 6 Wis. 205; *Rothbauer v. State*, 22 id. 468; *Labar v. Koplin*, 4 N. Y. 547. *

We are of the opinion that the court may fairly infer that the defendant lost this right of polling the jury by the absence of his counsel. It is not to be presumed that the defendant was so familiar with the forms of legal proceedings as to know that he had the right to poll the jury, and that knowing his right, he voluntarily waived it; nor is it reasonable to presume that he voluntarily waived the right to have his counsel present at so important a proceeding on his trial as the delivery and reception of the verdict. The Constitution of the State, art. I, sec. 7, provides that "in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel." This provision gives the defendant the right to be heard by his counsel throughout the whole trial; and when a defendant in a criminal action has employed counsel, or counsel has been assigned to him, such counsel has the right to be present during all the proceedings; and we think it is the duty of the court to see that such counsel is notified of the fact that the jury are about to render their verdict, when such verdict is rendered at a time when the court is not in session, unless the counsel has stated that he did not desire to be present, or has absented himself from the place of trial so that he could not be notified without unreasonably delaying the proceedings of the court. *Martin v. State*, 51 Ga. 567; *People v. Trim*, 37 Cal. 274; *Barrett v. State*, 1 Wis. 175. In the two cases first cited, the court held that it was error to take any step in the action in the absence of the counsel for the defendant; and in the Georgia case, the court held that no step could be taken in a criminal case unless the defendant had counsel present, and that if the counsel who had appeared in the case should voluntarily be absent the court should appoint another to protect his rights. This decision however was based

* See *James v. State*, 55 Miss. 57; s. c., 30 Am. Rep. 496, and note, 497. — REP.

upon a provision of the Constitution of that State which reads as follows: "Every person charged with an offense against the law shall have the privilege and benefit of counsel." The court seemed to be of the opinion that it was the duty of the court, under that provision, to see that the defendant was at all times furnished with counsel.

Our Constitution secures to the accused simply "the right to be heard by himself and counsel," and under that provision it is clearly competent for the accused to appear in person without counsel if he so determines, or to waive his right to have the assistance of his counsel in any stage of the prosecution. But we think when he has employed counsel, or when counsel has been assigned to defend him, he should not be held to have waived his presence and assistance at any stage of the proceedings unless his attention is called to the matter and he expressly waives such assistance. The Constitution of California provides that the "accused shall be allowed to appear and defend in person and with counsel, as in civil actions." Art. 1, § 8, Const. Cal. In *People v. Trim*, *supra*, the Supreme Court did not pass upon the right secured to the defendant under this provision of the Constitution, but based its decision upon section 408 of the criminal practice act, which expressly provided that if the jury returned into court for further instructions after the case had been submitted to them, the judge should, before giving further instructions, notify the counsel of the defendant so that he might be present. This case is not a direct authority therefore upon the question raised in this case. The question was raised in the case of *Barrett v. State*, 1 Wis. 175, but the court did not pass upon it, for the reason that the record did not show affirmatively that the counsel for the defendant was not notified. The learned justice who delivered the opinion says in conclusion: "The parties being present or notified so that they had an opportunity of attending, every purpose of justice and safety is answered." Construing the language of the learned justice, when he speaks of parties, as including their counsel, we fully concur with his opinion as expressed in that case.

It seems to us that where a defendant in a criminal action has retained counsel to defend him, the presence of such counsel at the time any important proceeding is taken in the case is much more important than the presence of the party himself. The very object of employing counsel is that the defendant may have some one to

Seaman v. Aschermann.

protect his rights who has more knowledge of the law and of legal proceedings than the accused himself; and he is therefore entitled to have such counsel present to protect his rights at every stage of the case, unless he expressly waives such presence and protection. In this case no presumption arises on the facts stated, that the accused did not desire the presence of his counsel at the time the verdict was received, or that he waived his right to have him present; and as the verdict was received at a time when the court was not in regular session, it should not have been received until the counsel for the defendant had been notified of the fact, so that he might have attended. The defendant having by his absence lost the right to poll the jury — we say lost the right, because we do not think it should be presumed that the accused knew he had that right, and voluntarily relinquished it — for this reason the judgment must be reversed. It was too late to poll the jury after they had been discharged and had separated.

We are not prepared to say that there is not sufficient evidence to sustain the verdict. Though the record does not make a strong case in favor of the State, yet the Circuit judge having refused to grant a new trial upon that ground, we would not feel justified in reversing his determination upon that point.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial. The warden of the State prison will surrender the plaintiff in error to the sheriff of Dunn county, who will hold him in custody until he shall be discharged, or his custody changed by due course of law.

Judgment reversed and cause remanded.

SEAMAN V. ASCHERMANN.

(51 Wis. 678.)

Specific performance — contract void by statute of frauds but partly executed.

Defendants orally agreed to take a lease of plaintiff's stores for five years, thus inducing him to break off negotiations for leasing to another party, and to incur expense in altering and adapting the stores to their own use. Defendants entered into possession and paid rent for two years, but neglected to execute the written lease in accordance with the agreement tendered them by plaintiff on taking possession, and at the end of two years refused to execute the lease, or longer to occupy or pay rent. *Held*, that they should be adjudged to execute the lease.

ACTION for specific performance. The head note states the facts. The defendants had judgment below.

Flanders & Bottum, for appellant.

Jenkins, Elliott & Winkler, for respondents.

ORTON, J. The facts stated in the complaint make a clear case of a verbal agreement to execute a five-years' lease, fully performed by the plaintiff, and partly performed by the defendants. The only question presented is, can this verbal agreement under these circumstances be enforced? Aside from the above facts of performance, it is conceded that the agreement is void by the statute of frauds, and can neither be enforced in equity nor damages recovered for its breach in a court of law. That this agreement for or as a lease for five years, even under the circumstances stated in the complaint, is so invalid under the statute that the rents reserved thereby, or damages for the breach of the same, could not be recovered in an action at law, is perfectly well settled. Story Eq. Jur., § 757. It is only in a court of equity, if at all, that relief can be obtained, and that for specific performance, if performance is possible. The general principle by which courts of equity grant specific performance of parol contracts for the sale of lands or interests in lands is clearly stated by Mr. Justice STORY, in his great work on Equity Jurisprudence: "That they do however interfere in some cases within the reach of the statute, is equally certain. But they do so, not upon any notion of any right to dispense with it, but for the purpose of administering equities subservient to its true objects, or collateral to it and independent of it." Story Eq. Jur., § 754.

The same learned author lays down more strictly the ground of equitable interference in such cases, as follows: "Courts of equity will enforce a specific performance of a contract within the statute, where the parol agreement has been partly carried into execution. The distinct ground upon which courts of equity interfere in cases of this sort is, that otherwise one party would be able to practice a fraud upon the other, and it could never be the intention of the statute to enable any party to commit such a fraud with impunity." And again, "Where one party has executed his part of the agreement in the confidence that the other party would do the same, it is obvious, that if the latter should refuse, it would be a fraud upon

Seaman v. Aschermann.

the former to suffer this refusal to work to his prejudice." *Id.*, § 759.

In *Potter v. Jacobs*, 111 Mass. 32, these principles were applied to the facts of that case and relief granted, and Mr. Justice COLT states the doctrine as follows: "The plaintiffs acted under their supposed rights as purchasers of the property. What they did was consistent with the agreement proved, and can be referred to no other title or claim of title. They were induced to enter upon the execution of the agreement, and to do acts upon the faith of it, as if it had been executed with the knowledge and acquiescence of the defendant, for which there would be no redress if the agreement was defeated. There was possession taken, accompanied by part payment, and such change of position that the purchasers cannot be restored to their rights if the contract be abandoned. The refusal to complete it is in the nature of a fraud, and the defendant is estopped to set up the statute of frauds in defense." To this expression of this true ground of equity relief are cited *Glass v. Hulbert*, 102 Mass. 24; s. c., 3 Am. Rep. 418; Fry on Spec. Perf., § 534; Adams Eq. 86.

In *Paine v. Wilcox*, 16 Wis. 202, this court has laid down the same doctrine, as follows: "But verbal agreements for the sale of lands are enforced in equity when there has been such a part performance that it would operate as a fraud upon either party to allow the other to repudiate."

The cases in this court in which this principle has been applied to parol agreements for the sale and conveyance of land, are too numerous to be cited, and the doctrine is too well settled to require further argument or authorities to sustain it. That the same doctrine is applicable to a parol agreement to execute a written lease, was held in *Fery v. Pfeiffer*, 18 Wis. 510. The following cases cited by the learned counsel of the appellant are clearly analogous and in point. *Nunn v. Fabian*, L. R., 1 Ch. App. 35; *Dowell v. Dew*, 1 Younge & C. (N. C.) 356; *Wills v. Stradling*, 3 Ves. Jr. 378; *McCarger v. Rood*, 47 Cal. 141; Wait's Act. and Def., 770, 777, 790, and cases cited; *Rankin v. Lay*, 2 DeG., F. & J. 65. See also, *Frame v. Dawson*, 14 Ves. Jr. 386. It is self-evident that this equitable relief must be mutual. If there has been sufficient execution or performance of the parol contract to entitle the lessee to enforce it, the lessor has the same equity, and both will be equally entitled to specific performance. It is said in *Dowell v. Dew*, *supra*,

Seaman v. Aschermann.

that Mrs. Bernhard, who had agreed to execute the lease, "at the time of her death was in a condition to have enforced the performance of the agreement in equity against him (the tenant) by reason of that part performance." In support of this general doctrine of equity, it may be said here, as was said by Chief Justice DIXON in *Brandeis v. Neustadt*, 13 Wis. 152, that our own statute (now found in § 2303, R. S.) saves the jurisdiction of the court "to compel the specific performance of agreements in cases of part performance of such agreements."

We are aware that in a very few of the States this doctrine is not upheld, but in England and in most of the States it is now undisputed. The facts stated in this complaint make one of the strongest and clearest cases for its application to be found in the books. The plaintiff was put to great expense to change and remodel the block of stores to make them suitable for the business of the defendants, and at their special instance and request, and in consequence and fulfillment of the agreement, and made out and executed and tendered the lease to the defendants for them to execute on their part; and the defendants went into full possession and enjoyment of the premises under said agreement, and for two years paid the plaintiff the rents stipulated in the agreement and the lease to be executed, and merely delayed, by sheer neglect and without refusal to execute the lease on their part. A stronger case for the exercise of this equity jurisdiction could hardly be made. The complaint stated a good cause of action, and the demurrer should have been overruled.

The order of the Circuit Court is reversed, and the cause remanded for further proceedings according to law.

Order reversed and cause remanded.

INDEX.

ACCEPTANCE.

See NEGOTIABLE INSTRUMENT, 683.

ACT OF GOD.

See CARRIER, 37.

ACTION.

1. Conflict of law — bond assigned by foreign administrator.] A resident of Massachusetts died there, possessing a bond and mortgage executed by a resident of South Carolina. His administrator sold and assigned the securities to a resident of South Carolina, who brought suit upon them there. *Held*, not maintainable. *Dial v. Gary* (S. C.), 737.
2. Parent and child — damages for death of minor child.] A father at common law cannot recover damages for the immediate death of his child produced by the negligence of a third person. *Edgar v. Castello* (S. C.), 714.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADMISSION.

See EVIDENCE, 624.

ADOPTION.

- County.] A child having been legally adopted and thus entitled to inherit real estate in another State, having with its adopted father become resident in Massachusetts, where similar laws of adoption prevail, may inherit real estate in Massachusetts, although the wife has given no formal consent to the adoption, as required in the latter State. *Ross v. Ross* (Mass.), 821.

ADULTERY.

See CRIMINAL LAW, 378.

AGENCY.

1. Collection by attorney through bank — appropriation by bank to attorney's debt — action by principal.] An attorney at law, being intrusted with a note for collection, deposited it in a bank for collection, without stating on whose account. The bank collected it and applied the amount

AGENCY — *Continued.*

on a debt of the attorney to the bank. The attorney becoming bankrupt, the bank made a settlement with his assignee, including the amount of the note. A year afterward, but as soon as he learned of the collection of the note, the owner demanded the proceeds of the bank, which being refused, he brought suit therefor. *Held*, not maintainable. *Wood v. Boylston National Bank* (Mass.), 866.

2. **Contract — fiduciary relation.]** A railway company, upon the application of one of its station agents, agreed to furnish an excursion train for a third party, as the correspondence indicated. Discovering that the train was really intended for the benefit of the agent, they refused to furnish it. *Held*, that they were not liable in damages to the agent. *Pegram v. Charlotte, Columbia and Augusta Railroad Company* (N. C.), 689.
3. **Execution of bond.]** A bond phrased, "I promise to pay," etc., and not mentioning the obligor's name in the body, was executed by an agent as follows: "Witness my hand and seal, H. S. Lucas [seal], for Charles Callender, president of the Chester Mica and Porcelain Co." *Held*, that the agent was individually liable on it. *Bryson v. Lucas* (N. C.), 634.
4. **Factor — sale of his own and principal's goods — action by principal.]** If a factor sells his own goods and his principal's, for a gross sum, the principal cannot recover of the purchaser for his own goods. *Roosevelt v. Doherty* (Mass.), 856.
5. **Negotiable instrument by public officer — mode of executing.]** A negotiable note made by school trustees, for the proper purposes of their office, and purporting to be their individual obligation, but with the addition to their signatures of their official description, is binding upon the school corporation. *School Town of Monticello v. Kendall* (Ind.), 139.
6. **Travelling salesman — evidence — custom.]** A travelling salesman and collecting agent of a Chicago mercantile house, who was paid a certain salary and his travelling expenses, hired horses and carriages in Wisconsin necessary for use in his employers' business, upon their credit, but neglected to pay for them. On settlement with the agent, his employer, allowed him for the hire of such horses and carriages, in ignorance that he had not paid it. Subsequently the owner sued them for the hire, and the defendants offered proof of a general commercial custom at Chicago to furnish such travelling salesmen with sufficient money for all expenses, and to forbid their pledging the credit of their employers therefor. This was excluded. *Held*, no error. The defendants also offered to prove such furnishing and prohibition in this instance. This was also excluded. *Held*, no error, the owners of the horses and carriages being ignorant of it. *Bentley v. Doggett* (Wis.), 827.
7. **To sign note — signing by sub-agent.]** A. authorized B. to borrow money for him of C. and signed A.'s name to a note therefor. B. borrowed the money, and in his presence and at his request D. signed the note thus: "A. by D." *Held*, that A. was bound. *Weaver v. Carnall* (Ark.), 22.

See SALE, 869.

AGREEMENT.

To form on shares.] See PARTNERSHIP, 697.

ALTERATION.

Of writing.] See EVIDENCE, 259.

See NEGOTIABLE INSTRUMENT, 68, 781.

ANIMALS.

Licensing exhibition of.] See MUNICIPAL CORPORATION, 399.

ARBITRATION AND AWARD.

Construction of submission — refusal to hear testimony.] Parties entered into an agreement for an arbitration to be “conducted and decided upon the principle of fair and honorable dealing between man and man.” On the hearing the parties presented written statements and were heard. One of them proposed to produce witnesses, but the majority of the arbitrators declined to allow it, on the ground that it was prohibited by the submission. *Held*, error. *Halstead v. Seaman* (N. Y.), 586.

Liability for damages.] See JUDGE, 185.

ARREST.

See CRIMINAL LAW, 58.

ASSAULT AND BATTERY.

See NEGLIGENCE, 170.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Authority to sell on credit — to retain assets until entire conversion.] An assignment for the benefit of creditors directed the trustee, “when he shall have realized cash from said assets, in such sums as he may deem proper, that he pay out the same *pro rata* to the said creditors by installments or dividends, or he may retain the same until all the assets are converted, then pay out the whole, and close up the entire matter at once.” *Held*, not conclusively void. *Eicks v. Copeland* (Tex.), 760.

ASSIGNMENT.

Foreign, for creditors.] See CONFLICT OF LAW, 360.

Of debt.] See SUBROGATION, 794.

See MORTGAGE, 274.

ATTORNEY.

1. Disbarring — evidence.] In proceedings to disbar an attorney where the charges are denied, the common-law rules of evidence apply. The accused is not to be tried upon affidavits, but is entitled to confront the witnesses and subject them to cross-examination and to invoke the well-settled rules of evidence. *In Matter of Eldridge* (N. Y.), 558.

ATTORNEY — *Continued.*

- 2 What is cause for removal.] An attorney in proceedings for the probate of a will, who had taken out a commission for the examination of a witness, prepared answers for such witness to the interrogatories and cross-interrogatories, furnished them to the witness who had received various sums of money from him, read a part of the answers to the commissioner and left the rest for the witness to repeat, and thus got the answers before the surrogate as honest testimony. *Held*, sufficient to authorize an order disbarring the attorney even though the answers were not shown to be false, and it appeared that the attorney believed them to be true. *Id.*
- Fee from.] See NEGOTIABLE INSTRUMENT, 675.

ATTORNEY AT LAW.

See AGENCY, 866.

BAIL.

- Confinement of principal in another State for insanity.] In an action on a bail bond it is no defense to the sureties that the principal at the time fixed for appearance was and still is insane and confined in an insane asylum in another State. *Adler v. State* (Ark.), 48.

BAILMENT.

- Contract between connecting railways, for use of cars.] By agreement between the parties, connecting railway companies, the defendant was to receive the defendants' cars for delivery at a point on the defendants' line, and to return them in as good condition as when received, ordinary wear and tear by use excepted. Both parties were to share the profits of the freight so carried, and defendant was to pay the plaintiff a fixed sum for the use of its cars. Without fault on the defendants' part, certain of the plaintiffs' cars were destroyed by fire on the defendants' line, while being thus transported. *Held*, that the defendant was not liable. *St. Paul & Sioux City R. R. Co. v. Minneapolis & St. Louis Ry. Co.* (Minn.), 404.

BANK.

1. Mistake — erroneously stamping note "paid" — clearing-house.] Bank A. having discounted a note, sent it through the clearing-house for payment, charging it to bank B. at which it was payable. The teller of the latter bank, erroneously supposing the maker was in funds, stamped it "paid." The mistake being discovered, the other bank and the indorser were notified of it before the close of banking hours, and the note was duly protested. Bank B. afterward paid it to Bank A., and sued the indorser. *Held*, maintainable. *Manufacturers' Nat. Bank v. Thompson* (Mass.), 876.
2. Savings — reasonableness of regulation — negligence.] A savings bank adopted the following rule: "If any person shall present a deposit book at the office of this corporation, and allege himself or herself, untruly, to

BANK — *Continued.*

be the depositor named therein, and shall thereby obtain from the officers of this corporation the amount deposited, or any part thereof, and the actual depositor shall not have given previous notice at the office of his or her book having been lost or taken from him or her, this corporation will not be responsible for the loss so sustained by any depositor, neither will this institution be liable to make good the same. Provided, that such payment has been entered in the book of the depositor at the time when made." This rule was conspicuously printed on the page fronting the title-page of the pass-book, and on the back of the pass-book was printed another of its rules to the effect that by receiving the pass-book the depositor would be considered as agreeing to be bound by the rules of the bank. A certain depositor was illiterate and could not read nor write when he opened his account and received his book, and he made his mark in the signature-book of the bank; but he subsequently learned to read and write. His book was temporarily stolen from his trunk, and the bearer received monies from the bank thereon without his knowledge. *Held*, that the payment was valid as against the depositor. *Burrill v. Dollar Savings Bank* (Penn. St.), 609.

Embezzlement from National.] See CRIMINAL LAW, 692.

BETTERMENTS.

See MORTGAGE, 627.

BILL OF EXCHANGE.

Assignment — equitable, of money to grow due — notice.] A. & S., being engaged in repairing a house for defendant, called upon him with the plaintiff, and requested him to accept an order in favor of the plaintiff for \$800, or give him a note or some security therefor, which he refused to do. Thereupon A. & S. gave the plaintiff, for value, a written order on defendant for \$800, directing him to "charge same to our account, for labor and materials performed and furnished in the repairs and alterations of the house," etc. The defendant refused to pay or recognize this order. At this time the work was nearly finished, but the amount due was uncertain. *Held*, that the order was an assignment of so much of the amount due or to become due, and a subsequent payment by the defendant to A. & S. in disregard of the order was wrongful, and no defense to an action on the order. *Brill v. Tuttle* (N. Y.), 515.

BILL OF SALE.

See EVIDENCE, 839.

BOND.

Execution of.] See AGENCY, 684.

BRIBERY.

See OFFICE AND OFFICER, 417.

BRIDGE.

State.] See MUNICIPAL CORPORATION, 468.

Swing, in highway.] See MUNICIPAL CORPORATION, 99.

See NEGLIGENCE, 75.

BURDEN OF PROOF.

See EVIDENCE, 144.

CANAL COMPANY.

See NEGLIGENCE, 58.

CARRIER.

1. **Liability of connecting.]** A consignee of goods by a line of connecting carriers may maintain an action for their loss against the carrier in whose hands the loss happens. *Packard v. Taylor* (Ark.), 87.
2. **Act of God — unseaworthy vessel.]** A carrier by water is not excused from liability for loss by the act of God operating upon an unseaworthy vessel, when such act would have proved harmless to a seaworthy vessel. *Id.*
3. **Liability as insurer — conflict of laws.]** The consignees of goods, residing in Boston, contracted with a transportation company in New York for the carriage of the goods from New York to Boston, and the delivery to them at Boston. The defendants, connecting carriers, residing in Massachusetts, received the goods from the New York transportation company. On the arrival at Boston the goods were demanded, but refused because delivery was not then convenient, and the same afternoon they were unloaded and placed in defendant's warehouse, too late for delivery. The same night the warehouse and goods were burned up. *Held*, that defendants were liable for the goods, although under Massachusetts decisions a railroad company under similar circumstances would not have been liable. *Faulkner v. Hart* (N. Y.), 574.
4. **Negligence, contributory — passenger injured while riding in baggage car.]** A passenger who voluntarily rides in a baggage car, by permission of the conductor, but against the rules of the railroad conspicuously posted in that car, and is injured in consequence of riding there, cannot recover from the railroad company on the ground of its negligence. *Pennsylvania Railroad Company v. Langdon* (Penn. St.), 651.
5. **Negligence — railroad — duty toward passengers alighting at freight depot.]** A railway company, inviting a passenger to alight after dark at a freight depot, instead of a regular passenger depot, is bound to keep the platform and approaches in a safe condition for the passenger's reception and egress, and to provide lights if necessary to his safety. *Stewart v. International, etc., Railroad Company* (Tex.), 753.
6. **Negligence — railway bed — damage by sudden and heavy rain-fall.]** By a sudden and extraordinarily heavy rain-fall, about dark, confined to a limited locality, a portion of a railway bed was so undermined that it

CARRIER — Continued.

gave way under the weight of a train, three or four hours afterward, and a passenger was injured. The railway bed was in safe condition before the rain-fall; a train had safely passed over it two hours before the accident; and it had been inspected between the time of the passage of that train and the time of the accident, and was apparently in safe condition. The defect was not visible at the time of the accident. The train in question was carefully run at half speed at the time in question. *Held*, that no action would lie against the company. *Railroad Company v. Hallaren* (Tex.), 744.

7. **Negligence — infant on freight car without paying fare — injury while attempting to perform service.]** An infant rode upon a freight car in a freight train, without the consent of his parents, and without the knowledge of the conductor, and without paying fare. The rules of the company prohibited the carrying of passengers without fare, or on freight trains except in the caboose. The conductor knowingly suffered him to remain on the freight car. A brakeman, without authority, set him at a dangerous service on the car, in trying to perform which he was injured. *Held*, that the company was not liable. *Sherman v. Hannibal and St. Joseph Railroad Company* (Mo.), 423.

8. **"Passenger" leaving cars in motion.]** A railway train having overshot a station, a passenger for that station got off while the train was in motion, and was killed by another train while making his way to the station. *Held*, that he had ceased to be a passenger, and the railway company was not criminally liable under the statute. *Commonwealth v. Boston and Maine Railroad* (Mass.), 882.

See NEGLIGENCE, 53.

CHATTEL MORTGAGE.

Sale under.] *See* SALE, 258.

See TRUST, 190.

CHECK.

See LIMITATION, 569; NEGOTIABLE INSTRUMENT, 410.

COMITY.

See ADOPTION, 821.

COMPROMISE OF CRIME.

See CONTRACT, 202.

CONDITION.

See DEED, 205; INSURANCE, 488, 501.

CONDITIONAL SALE

See SALE, 661.

CONFLICT OF LAW.

Foreign assignment.] A voluntary assignment, by a debtor residing in another State, of property in Massachusetts, for the benefit of creditors, is postponed to a subsequent attachment by a non-assenting creditor residing in Massachusetts. *Pierce v. O'Brien* (Mass.), 360.

See ACTION, 737; CARRIER, 574; EVIDENCE, 533; USURY, 533.

CONSTITUTIONAL LAW.

1. **Damage to private property for public use—execution of provision.]** Where a city in changing the grade of streets permanently injures private property, and thus infringes the explicit provision of the bill of rights, that private property shall not be taken or damaged for public use without compensation, an action lies for the injury, although no statute has ever been enacted for the enforcement of this constitutional provision. *Johnson v. City of Parkersburg* (W. Va.), 779.
2. **Excise.]** A statute prohibited the sale of intoxicating liquors, save by licensed druggists for certain excepted purposes. *Held*, constitutional. *Intoxicating Liquor Cases* (Kans.), 284.
3. **Local option liquor laws.]** A police law, to take effect upon local adoption, is not unconstitutional. *Boyd v. Bryant* (Ark.), 6.
4. **State regulation of rafts.]** A statute of Massachusetts, prohibiting the driving or floating of logs, timber, etc., down the Connecticut river, unless the same are formed into rafts and sufficiently manned, is constitutional as to logs, etc., coming from another State through Massachusetts on the way to a third State. *Harrigan v. Connecticut River Lumber Company* (Mass.), 387.
5. **Statute—construction—Opium Act.]** A statute “to regulate the sale or disposal of opium, and to prohibit the keeping of places of resort for smoking or otherwise using that drug,” is not unconstitutional as embracing more than one subject. *State v. Ah Sam* (Nev.), 454.
6. **“To resort.”]** To ‘resort’ means to go once. *Id.*

CONTRACT.

1. **Between tenants in common as to survivorship.]** An agreement in writing, between tenants in common, that the survivor shall take the other's estate, is invalid. *Hershy v. Clark* (Ark.), 1.
2. **—.]** A joint will, conditioned to take effect on the death of both, is invalid. *Id.*
3. **Express, by one for board of another, merges the latter's implied.]** Where an insane person is received into an asylum, on the application of others and on an express contract by third persons to pay for his board and expenses, no action can be maintained against him by the asylum therefor. *Massachusetts General Hospital v. Fairbanks* (Mass.), 303.
4. **Illegal—compromise of crime.]** An agreement by one under sentence for crime to deliver notes and money to the prosecuting witness on condition

CONTRACT — *Continued.*

of his signing a petition for pardon, and the granting of such petition, or a subsequent discharge on a new trial, is void. *Haines v. Lewis* (Iowa) 202.

6. To procure discontinuance of criminal prosecution — public policy.] An agreement to pay one for endeavoring to induce the complainants in a criminal prosecution for felony to discontinue proceedings is void. *Rhodes v. Neal* (Ga.), 93.

6. Validity — promise to give real estate for support — devise of same by invalid will.] An oral agreement by a father to give his son a farm at his death, in consideration of a support for himself and his wife for their lives, being carried out by his son, is binding, and an invalid devise of the farm to the son does not defeat it. *Hiatt v. Williams* (Mo.), 438.

7. Validity — judgment in consideration of compounding felony.] A judgment confessed in consideration of the suppression of a prosecution for forgery is void, and should be set aside on the motion of the person confessing it. *Appeal of Bredin* (Penn. St.), 677.

Repudiation.] See INFANCY, 407, 412.

Ways of privity.] See NEGLIGENCE, 185.

See AGENCY, 639; BAILMENT, 404; SPECIFIC PERFORMANCE.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 410.

CORPORATION.

1. Liability of stockholders — attempt to evade.] A private corporation, the stockholders of which were not individually responsible for its debts, increased its stock under authority of its charter, and subscriptions to such new stock were made upon the agreement, set forth in the subscription paper, that no assessment should be made, and that each subscriber was to pay only \$10 per share for such new stock, the par value of which was \$100 per share. *Held*, that this provision was void as against creditors of the corporation without notice of it, and that such creditors could enforce payment for such stock to the extent of their demands. *Union Mut. Life Ins. Co. v. Frear Stone Manuf. Co.* (Ill.), 129.

2. Subscription to stock.] A writing, reciting an association for the purpose of organizing a bank, and stating among other things "the names and residence of the shareholders with the number of shares held by each," and subscribed by the incorporators, constitutes a subscription to the capital stock, on the part of the signers, and binds them to pay for the number of shares set opposite their respective names. *Nulton v. Clayton* (Iowa), 218.

COUPON.

Payment of stolen.] See NEGLIGENCE, 297.

CRIMINAL LAW.

1. **Homicide by police officer in unlawful arrest.]** Where a police officer, without warrant, and for an alleged offense not committed in his presence, arrested an innocent man, and in trying to prevent his escape, killed him, this was at least manslaughter. *O'Connor v. State* (Ga.), 58.
2. **Embezzlement from National bank.]** Embezzlement from a National bank is not punishable by a State court of Pennsylvania. *Commonwealth v. Ketner* (Penn. St.), 692.
3. **Evidence — adultery — reputation of woman for chastity.]** On the trial of an indictment for adultery, evidence is competent to show the reputation for chastity of the woman with whom the offense is charged to have been committed. *Commonwealth v. Gray* (Mass.), 378.
4. **— bastardy — exhibition of child to jury.]** In bastardy proceedings, the public prosecutor exhibited to the jury the child, two years and a month old, and commented on the resemblance to the defendant. *Held* no error, especially when the court instructed the jury that if they did not see the resemblance they should disregard the comments. *State v. Smith* (Iowa), 192.
5. **— res gestæ — antecedent declarations of deceased.]** Where two agree to arm and fight, and then separate and arm, and meet within an hour and fight, and one is killed, the declarations of the deceased in the interval to a third person, to the effect that the other party was seeking his life, are admissible in evidence on an indictment for murder. *Cox v. State* (Ga.), 76.
6. **Extortion — corrupt intent.]** A corrupt intent is essential to constitute a crime of extortion, and such intent is sufficiently charged by the use of the word "extorsively." *Leeman v. State* (Ark.), 44.
7. **Indictment — "one pint" less than "five gallons."]** Under a statute punishing the sale of spirituous liquors in quantities "less than five gallons," an indictment for selling "one pint of brandy" is valid. *State v. Lavake* (Minn.), 415.
8. **Larceny — bringing stolen goods into State.]** Where one stole a horse in Tennessee, and drove it across the boundary into a border county of Georgia, and from place to place in that county, *held*, that he was not guilty of larceny in Georgia. *Lee v. State* (Ga.), 67.
9. **Pardon after punishment.]** A pardon may be granted after the offense is fully expiated. *State v. Foley* (Nev.), 458.
10. **—.]** One convicted in another State of an infamous offense is thereby disqualified from testifying in Nevada. *Id.*
11. **Trial — bailiff in jury room.]** The presence of the officer, who has charge of the jury in a capital case, in their room during part of their deliberations, is not a sufficient cause for setting aside a verdict of guilty, unless it appears that the jury were improperly influenced or the rights of the accused were prejudiced thereby. *Gainey v. People* (Ill.), 109.
12. **Trial — presence of prisoner at verdict — discharge.]** The prisoner in a case of felony not capital is entitled to be present when the jury bring

CRIMINAL LAW—*Continued.*

in their verdict; this right cannot be waived by his counsel; but a verdict in his absence, the reception of which is assented to by his counsel, does not entitle him to a discharge, but only to a new trial. *State v. Jenkins* (N. C.), 648.

12. Verdict — presence of prisoner's counsel at.] Where a verdict of guilty in a case of felony is received in the absence of the prisoner's counsel without his fault, and the right to poll the jury is thus lost, it is ground for a new trial. *Smith v. State* (Wis.), 845.

CUSTOM.

See EVIDENCE; AGENCY, 827.

DAMAGES.

1. Measure of — negligence.] In an action of damages for personal injuries by negligence producing permanent disability, the measure of damages is such an amount as will purchase an annuity equal to the interest on the difference between what the plaintiff could earn before and what he could earn after the injury, and not such a principal sum as would produce such interest. *Houston, etc., Railroad Company v. Willis* (Tex.), 753.
2. — property taken by mistake.] In trespass for taking coal by mining, the act not being willful or negligent, the measure of damages is the value at the mouth of the shaft, less the cost of severing and raising. *Austin v. Huntsville Coal and Mining Company* (Mo.), 446.

DECLARATIONS.

See CRIMINAL LAW, 76.

DEED.

1. Condition against alienation.] In a deed granting a life estate to one, with remainder in fee to his children, a condition against alienation by the grantee or sale for his debts is void. *McCleary v. Ellis* (Iowa), 205.
2. Recording — quit-claim.] A recorded unrestricted quit-claim deed takes precedence of a prior unrecorded warranty deed of the same premises by the same grantor. *Brown v. Banner Coal and Oil Company* (Ill.), 105.

DELIVERY

Symbolical.] *See* STATUTE OF FRAUDS, 11.

See MORTGAGE, 724.

DISORDERLY HOUSE

See MUNICIPAL CORPORATION, 209.

DISSOLUTION.

Notice of.] *See* PARTNERSHIP, 168.

INDEX.

DIVORCE.

See PARENT AND CHILD, 255.

DRUNKENNESS.

See MUNICIPAL CORPORATION, 212.

DURESS.

Of wife.] A public defaulter disclosed his situation, and his liability to criminal prosecution to his wife, and urged her to mortgage her property to secure his sureties. He had not been threatened with criminal prosecution by them, nor did he represent to his wife that he had been; but he told her that sooner than go to jail he would kill himself. She executed, acknowledged and delivered the mortgage without final objection, after several days' hesitation and importunity. The mortgagees had no knowledge of her reluctance. *Held*, a valid mortgage. *Lafare v. Dutruw* (Wis.), 838.

ELECTION.

See OFFICE AND OFFICER, 417.

EMBEZZLEMENT.

From National bank.] *See* CRIMINAL LAW, 692.

EMINENT DOMAIN.

See CONSTITUTIONAL LAW, 779.

ESTATE.

See WILL, 681.

ESTOPPEL.

See INSURANCE, 750; MORTGAGE, 475; MUNICIPAL CORPORATION, 788.

EVIDENCE.

1. **Admission of execution of bond — subscribing witness.]** In an action on a bond, the entry by the clerk on the docket that the defendants admit the execution of the bond, is competent and conclusive evidence, although the bond had a subscribing witness. *Jones v. Henry* (N. C.), 624.
2. **Alteration of written instrument — question as to when made.]** A negotiable note offered in evidence, bearing on its face an apparent material alteration, is admissible, and the question as to the time of alteration is for the jury. *Neel v. Case* (Kans.), 259.
3. **To contradict bill of sale — receipt.]** An instrument in the form of a receipt for goods, specifying kinds, numbers, prices, and total value, all in the writing of the receiver, and upon which the other party indorses money paid at the time, is a contract of sale and cannot be varied or explained by parol. *Schulz v. Coon* (Wis.), 839.
4. **Burden of proof — right dependent on a negative.]** A statute enacted

EVIDENCE — *Continued*,

that a license to retail intoxicating liquors might be granted, provided the applicant be a fit person, and not in the habit of becoming intoxicated, but not otherwise. In an appeal by one whose application was refused, *held*, that the burden was on him to prove that he was a fit person and not in the habit of becoming intoxicated. *Goodwin v. Smith* (Ind.), 144.

5. **Grand juror — testifying to testimony before grand jury.]** It is competent for a grand juror, on the trial of an indictment, to testify to what the prosecutor testified before the grand jury, for the purpose of showing a discrepancy between that and her testimony on the trial. *Gordon v. Commonwealth* (Penn. St.), 672.
 6. **Handwriting — comparison with photographs.]** A witness cannot be allowed to give his opinion as an expert on a question of disputed handwriting, founded on a comparison of the disputed signature with photographic copies of other writings not in evidence, and the accuracy of which is not shown by extrinsic testimony. *Hynes v. McDermott* (N. Y.), 538.
 7. **Opinion — basis.]** A witness cannot be allowed to give his opinion on a question of disputed handwriting, where his knowledge was acquired in the proceedings in the suit, and was based solely on comparison and admissions. *Id.*
 8. **Merchant's account-books.]** Shop books are secondary evidence, only admissible upon proof that the persons selling the goods are inaccessible. They will not establish large items of cash, nor accounts of third person transferred to defendants, without proof of the authority for the transfer. *Bracken v. Dillon* (Ga.), 70.
 9. **Opinion — value of services.]** A non-expert witness, familiar with the facts, may testify as to the relative value of services and commodities entering into a mutual account. *Johnson v. Thompson* (Ind.), 152.
 10. **Presumption — conflict of law.]** Although lotteries are illegal in New York, yet a contract made there to advertise in Virginia a lottery to be drawn in Virginia, will not be held invalid in the absence of any proof of the law of Virginia. *Ormes v. Dauchy* (N. Y.), 588.
 11. **Sheriff's receipt on execution.]** A final indorsement by a sheriff on an execution of a small sum "in full of this case" is presumptively a satisfaction of the execution, although the sum of the indorsements is much less than the amount of the judgment. *Steele v. Atkinson* (S. C.), 728.
- To disbar.]** See ATTORNEY, 558.
- Of employee's hours of work.]** See NEGLIGENCE, 699.
- Judgment against principal.]** See SURETY, 249.
- Reputation for chastity.]** See CRIMINAL LAW, 378.
- Settlement by principal.]** See SURETY, 229.

See AGENCY, 827; CRIMINAL LAW, 76, 192; WILL, 555.

EXECUTION.

Lien on fixtures.] See **FIXTURES**, 789.

See **MUNICIPAL CORPORATION**, 74; **PARTNERSHIP**, 287.

EXECUTOR AND ADMINISTRATOR.

1. **De bonis non — collusive compromise of debt by predecessor.]** An administrator *de bonis non* cannot set aside a transaction between his predecessor and a debtor of the estate, on the ground of a fraudulent collusion between them. *Steele v. Atkinson* (S. C.), 728.
2. **Voluntary and excessive payment by — limitation.]** An administrator made a voluntary payment out of his trust funds to a person entitled thereto as a distributee, and by mistake paid more than such person's share. More than six years from the time of such payment having elapsed, *held*, that the amount could not be recovered or set off. *Montgomery's Appeal* (Penn. St.), 670.
3. **Pledge of estate securities for individual debt.]** One of several executors pledged to his broker, as collateral security for his own debt, certificates of stock belonging to the estate. The broker pledged them to a third, who advanced money on them, supposing the broker to be the owner. The transfers showed on their face that the title came from the executor. *Held*, that the other executors could not recover the stock without paying those advances. *Wood's Appeal* (Penn. St.), 694.

Foreign administrator.] See **ACTION**, 737.

EXEMPTION.

See **HOMESTEAD**, 720.

EXTORTION.

See **CRIMINAL LAW**, 44.

FACTOR.

See **AGENCY**, 356.

FIXTURES.

1. **Mirrors — gas-fittings.]** Gas-fittings, screwed on the gas-pipes of a building and mirrors supported by hooks driven into the walls, are not fixtures, as between mortgagor and mortgagee. *McKeage v. Hanover Fire Ins. Co.* (N. Y.), 471.
2. **On land but not yet affixed — affixed and accidentally separated.]** An engine and boiler, brought by the owner of a mill upon the mill grounds for the purpose of being put into the mill, and necessary for the operation of the mill, are fixtures, although not actually annexed; and such articles, once annexed, continue fixtures, although washed out by a flood. *Patton v. Moore* (W. Va.), 789.

FIXTURES — Continued.

3. **Execution.]** If such articles, levied on, are afterward attached to the realty with the consent of the execution creditor, the lien of the execution is released. *Id.*

FIDUCIARY RELATIONS.

See AGENCY, 689.

FORFEITURE.

See INSURANCE, 750.

FRAUD.

See INFANCY, 412; JURISDICTION, 97

GIFT.

1. **From parent to child — revocation.]** An executed gift of personal property from a father to his minor child residing in his family is valid and irrevocable, although the property continues in the house occupied by the family. *Kellogg v. Adams* (Wis.), 815.
2. **Savings-bank deposit — trust.]** In view of death, A. delivered to B. a sealed package containing a sum of money and savings-bank books, and a writing signed by him, stating where he wished to be buried, and directing that the balance, after paying all bills and expenses, should be divided among specified persons, at the same time telling B. of the contents and generally of the directions. *Held*, a valid gift *causa mortis* in trust. *Pierce v. Boston Five Cent Savings Bank. Turner v. Estabrook* (Mass.), 871.
3. **—.]** The gift of a savings-bank book, *causa mortis*, carries the deposit without any assignment. *Id.*
4. **Debt of estate to donee.]** If the donee is a creditor of the estate, and the only one not paid, it is no defense that his debt cannot be paid without including the deposit in the assets. *Id.*

GRAND JUROR.

See EVIDENCE, 672.

HANDWRITING

See EVIDENCE, 538.

HIGHWAY.

Defect in.] *See* NEGLIGENCE, 887.

HOMESTEAD.

Exemption — marriage after levy.] The marriage of an execution debtor, after levy on personal property but before sale, does not entitle him to a homestead exemption. *Pender v. Lancaster* (S. C.), 720.

HOMICIDE.

See CRIMINAL LAW, 58.

HUSBAND AND WIFE.

See MARRIAGE.

INDICTMENT.

See CRIMINAL LAW, 415.

INDORSEMENT.

Restrictive.] *See* NEGOTIABLE INSTRUMENT, 95.

INFANCY.

1. **Contract — repudiation — refunding.]** An infant may disaffirm a chattel mortgage executed by him as security for borrowed money, and reclaim the chattels without refunding the money, it not appearing that he is able to repay. *Miller v. Smith* (Minn.), 407.
- 2 **Repudiation — fraud.]** An infant is not estopped from pleading infancy to an action for the price of goods, not necessities, by the fact that he represented himself to be of age when he bought the goods, and the seller relied on that representation. *Conrad v. Lane* (Minn.), 412.

See MUNICIPAL CORPORATION, 99 ; NEGLIGENCE, 705.

INJUNCTION.

See MUNICIPAL CORPORATION, 89.

INSANITY.

Power of court to order sale of lunatic's real estate.] *See* JURISDICTION, 111;
See BAIL, 48; INSURANCE, 594.

INSURANCE.

1. **Condition — "refined coal or earth oils" — kerosene — waiver.]** A fire insurance policy on a stock of goods was conditioned to be void, if "refined coal or earth oils are kept for sale, stored, or used on the premises, without written consent." On the application the agent inspected the premises, and saw and was informed that kerosene was used for lighting them. *Held*, that such use of kerosene did not avoid the policy. *Beard v. North British, etc., Ins. Co.* (N. Y.), 501.
2. — **"vacant and unoccupied."] Plaintiff procured an insurance on his summer dwelling. He removed from it in November, leaving the furniture in it, and leaving it in care of a person residing near it, intending to reoccupy it the next spring. Held, that the dwelling was not thus "vacant and unoccupied," and the insurance was not void. *Herrman v. Merchants' Ins. Co.* (N. Y.), 488.**
3. **Failure to pay premiums through insanity — dividends.]** The insanity of the insured is not an excuse for his failure to pay premiums, and when

INSURANCE—*Continued.*

the premiums are not paid the insurer is not bound without demand to apply unpaid dividends thereon. *Wheeler v. Connecticut Mut. Life Ins. Co.* (N. Y.), 594.

4. **Forfeiture — notice — estoppel.]** In an action on a policy of insurance on a cotton-seed-oil-factory, the company defended on the ground that the policy was forfeited by the use of cotton-gins on the premises, the increase of the risk thereby, and the concealment of the fact by the insured. It appeared, however, that an agent of the company told the secretary, at another town, on the street, that the gins were being so used, but that the secretary forgot the information. *Held*, (1) that this did not as matter of law constitute knowledge on the part of the company; but (2) if it did the company were not bound to cancel the policy. *Texas Banking Co. v. Hutchins* (Tex.), 750.
 5. **"Incumbrance" — mechanics' lien.]** A mechanics' lien is an "incumbrance" within the meaning of a warranty against "incumbrances" in a fire insurance policy. *Redmond v. Phoenix Fire Ins. Co.* (Wis.), 830.
 6. **"Keep, have or use" — benzine for cleaning — "burning fluid or chemical oils."]** A fire insurance policy on a distillery forbade the assured to "keep or have" on the premises "petroleum, naphtha, benzine, benzole, gasoline, benzine-varnish," etc., or to keep, have or use camphene, spirit gas, or any burning fluid or chemical oils," etc. *Held*, that this did not prohibit temporary taking of benzine on the premises for the cleaning of machinery, and the use of the same therefor. Also *held*, that whether benzine was a "burning fluid or chemical oil" was a question of fact. *Mears v. Humboldt Ins. Co.* (Penn.), 647.
 7. **Limitation — when attaches.]** An insurance policy provided that no action should be sustained thereon unless commenced within six months after the loss should occur; and also that no suit could be maintained until arbitrators had fixed the amount of the loss. *Held*, that the action could be commenced within six months after the arbitrators had fixed the amount of the loss, although more than six months after the loss occurred. *Barber v. Fire & Marine Ins. Co. of Wheeling* (W. Va.), 800.
 8. **Payment of premium by third person.]** Where payment is made a condition precedent, the first payment of a life insurance premium by a third person, without the knowledge of the insured, although with his money, is of no effect. *Whiting v. Massachusetts Insurance Company* (Mass.), 817.
- By tenant for landlord.]** See LANDLORD AND TENANT, 277.

INTEREST.

After maturity.] In an action upon a contract to pay a sum of money at a certain time with interest at a specified rate, the creditor is entitled to recover interest at that rate, not merely until the agreed time for payment of the principal, but until it is actually paid or his claim for principal and interest is judicially determined. *Union Institution for Savings v. City of Boston* (Mass.), 305.

INTENT.

See CRIMINAL LAW, 44.

JUDGE.

Arbitrator — civil liability for corrupt action.] An arbitrator is not liable in an action for damages for a corrupt and fraudulent award. *Jones v Brown* (Iowa), 185.

JUDGMENT.

On Sunday.] *See* SUNDAY, 466.

Void.] *See* CONTRACT, 677.

See SURETY, 249.

JURISDICTION.

1. Lunatic's real estate — inherent power of court to order sale.] A court of equity has inherent power to order a sale of a lunatic's real estate. *Dodge v. Cole* (Ill.), 111.

2. Obtained by fraud — when conclusive.] In a suit on a judgment obtained by default in another State, the defendant pleaded that he was fraudulently induced to go within the other State for the purpose of serving process on him. *Held*, not a valid defense, in the absence of facts showing an excuse for not moving to set aside the service, and for acquiescing in the judgment. *Peel v. January* (Ark.), 27.

JURY.

Officer in room.] *See* CRIMINAL LAW, 109.

LARCENY.

See CRIMINAL LAW, 67.

LANDLORD AND TENANT.

1. Building occupied by distinct tenants — duty of landlord in respect to common stairway.] A landlord letting rooms in the same building to different tenants, the building having a common stairway, is bound to keep the stairway in reasonable repair, and the tenants are not to be conclusively deemed negligent in using it after learning that it has become dangerous. *Looney v. McLean* (Mass.), 295.

2. Lease of realty and personalty — destruction of personalty by fire — insurance for landlord.] Where real and personal property are leased by a single instrument for an amount in gross, and the personalty is a substantial part of the property leased, its destruction without the fault of the lessee, by fire or otherwise, entitles the lessee to an apportionment of the rent; and where the lease binds the lessee to insure the personalty in a specified amount for the benefit of the lessor, and he fulfills this covenant, the lessee is relieved by destruction of all the leased property by fire from the subsequent payment of any rent, although he has covenanted to keep the premises in repair. *Whitaker v. Hawley* (Kans.), 277.

LEASE.

See LANDLORD AND TENANT, 277.

LEGACY.

See WILL, 614.

LICENSE.

See MUNICIPAL CORPORATION, 60.

LIEN.

On after-acquired property — lease — rent.] A lease of a hotel in process of erection stipulated that all furniture and fixtures should be bound for the rent. It was to take effect at a future day. When signed, the hotel was unfurnished, but before it took effect there were furniture and fixtures in the hotel. The rent was payable monthly. *Held*, that a lien attached upon the furniture and fixtures for the full amount of rent reserved, and had priority over a mortgage given after the lease took effect, but before rent was in arrears, to one knowing of the stipulation. *Wright v. Bircher's Executor* (Mo.), 433.

On after-acquired property.] *See* LANDLORD AND TENANT, 433.

LIMITATION.

Check — no funds.] Where the drawer of a check has no funds with the drawee to meet it, the statute of limitations begins to run from its date. *Brush v. Barrett* (N. Y.), 569.

See ADMINISTRATOR, 670; INSURANCE, 800.

LOCAL OPTION.

See CONSTITUTIONAL LAW, 6.

LOTTERY.

See EVIDENCE, 583.

MALICIOUS PROSECUTION.

End of original prosecution — nolle prosequi.] In an action for maliciously instituting criminal proceedings, the entry of *nolle prosequi* and the discharge of the defendant, upon the request of the complainant, is a sufficient conclusion of such proceedings. *Hatch v. Cohen* (N. C.), 630.

MARRIAGE.

1. Evidence.] To establish a marriage, facts were shown, part occurring in England, part in France, and part on a vessel crossing from England to France. Those occurring in England did not establish a marriage according to the law of England. The nationality of the vessel or the marriage law of France was not shown. The facts shown being otherwise sufficient to establish a marriage under New York law, *held*, that the nationality of the vessel would not be presumed to be of a country having different

MARRIAGE — *Continued.*

marriage laws from New York, nor would the marriage laws of France be presumed different from those laws. *Hynes v. McDermott* (N. Y.), 588.

2. **Married woman's liability for family goods bought on credit of her separate estate.]** Under the Wisconsin statute concerning the separate property and business of married women, where a married woman owns a farm, and she and her husband are engaged together in carrying it on, and purchased goods for the use of the family upon the credit of the wife's ownership of the farm, she as well as her husband becomes liable therefor at law, as if unmarried, whether the contract is written, oral, or partly written and partly oral. *Krouskop v. Shonts* (Wis.), 817.

See HOMESTEAD, 720.

MARRIED WOMAN.

See MARRIAGE.

MASTER AND SERVANT.

1. **Lost time by servant.]** One agreed to serve another for a year at a gross price. He worked up to the end of the year, but was absent at different times nine days and a half in all. *Held*, that he was entitled to full pay. *Bast v. Byrne* (Wis.), 841.
2. **Contributory negligence — low bridge.]** An employee of a railroad company, who rides on the top of a freight train, voluntarily and out of the line of his employment, and while there is struck and killed by a low bridge, the situation and character of which he is acquainted with, is guilty of such contributory negligence as prevents a recovery. *Pittsburg and Connellsville Railroad Company v. Sentmeyer* (Penn. St.), 684.
3. — **of co-servant.]** A master who negligently employs unsafe and defective machinery is liable to his servant injured in the use of it, by means of its defective condition, although the negligence of a co-servant contributed to the injury. *Cone v. Delaware, etc., Railroad Company* (N. Y.), 491.
4. **Negligence — superior servant.]** A railroad company is liable to an employee injured by the negligence of a superior fellow-servant whose directions he was bound to obey. *Cowles v. Richmond and Danville Railroad Company* (N. C.), 620.
5. — **machinery.]** A master is liable for an injury sustained by his servant by reason of defective appliances put in his hands by himself or his agents, unless he shows that he has been diligent and circumspect in his choice of such agents and in the selection and preservation of such appliances; or that the servant knew the defects and continued to use the appliances without notifying the master of the defects; or that the servant was himself guilty of contributory negligence in such use. *Id.*
6. — **general superintendent — acting as co-servant.]** The plaintiff was an employee in defendant's iron-works, which were under the man

MASTER AND SERVANT — *Continued.*

agement and control of defendant's agent, B.; the defendant living elsewhere and only occasionally visiting the works. B. carelessly let steam on an engine near which plaintiff was working, whereby the plaintiff was injured. In an action for that injury, the court charged that B. represented the defendant only in respect to the duties confided to him as managing agent, but refused to charge that as to other duties he was to be regarded as a fellow-servant with the plaintiff, and left it as a question of fact. *Held*, that such refusal was error. *Crispin v. Babbitt* (N. Y.), 521.

7 — [dangerous structure.] A railway company is liable for an injury sustained by one of its brakemen, by the fall of a derrick erected by its employees at the side of its track, in such a position as to be liable to cave away with the bank, and negligently suffered so to remain. *Holten v. Fitchburg Railroad Company* (Mass.), 348.

8. Parent and child — [master persuading servant to sexual intercourse with his minor child.] An employer persuaded his female servant to consent to sexual intercourse with his minor son, to whom she was affianced. The son subsequently refused to marry her. *Held*, no ground of action of damages against the employer and father. *Jordan v. Hovey* (Mo.), 447.

MEASURE OF DAMAGES.

See DAMAGES, 446.

MECHANICS' LIEN.

See INSURANCE, 880; MUNICIPAL CORPORATION, 189.

MERGER.

See MORTGAGE, 316

MISTAKE.

Promise to correct.] *See* PROMISE, 687.

Property taken by.] *See* DAMAGES.

See BANK, 376.

MORTGAGE.

1. Assignment — [subsequent payment to mortgagee — notice.] A *bona fide* indorsee of a negotiable note, and assignee of a real mortgage executed as security therefor, is not prejudiced by a conveyance of part of the mortgaged premises, thereafter made without his knowledge or consent by the mortgagor to the mortgagee; although the assignment is not recorded or notice of it given to the mortgagors, and a statute provides that the recording of the assignment of a mortgage shall not be deemed notice to the mortgagor, so as to invalidate payments to the mortgagee. *Burhans v. Hutcheson* (Kans.), 274.

2. Assumption — merger.] A mortgagor conveyed the mortgaged premises,

MORTGAGE — *Continued.*

the grantee assuming the mortgage. The grantee afterward conveyed the premises to the mortgagee, the deed reciting that the conveyance was subject to the mortgage. *Held*, that the mortgage was merged, and there could be no recovery on the mortgage note. *Dickason v. Williams* (Mass.), 816.

3. **After-acquired personal property.]** A mortgage of personal property, of which the mortgagor has no possession or right of possession, and which is not the natural product of property of which he has possession or right of possession, is invalid against antecedent creditors, subsequently obtaining judgment and levying upon the same before delivery. *Parker v. Jacobs* (S. C.), 724.
4. **Delivery.]** Delivery of personal property to a railroad company for shipment to a mortgagee thereof is not delivery to the mortgagee at his residence, to be sold by him as factor, and does not transfer the title. *Id.*
5. **Betterments.]** One who buys mortgaged premises, without actual knowledge of the mortgage, the mortgage however being recorded, and puts betterments on the premises, cannot have any allowance therefor, unless there is a surplus on foreclosure. *Wharton v. Moore* (N. C.), 627.
6. **Mortgagee in possession — liability for use and repairs.]** A mortgagee of real estate, in possession, is liable for the fair rental value of the premises without regard to the net profit, and is bound to keep them in ordinary repair. *Barnett v. Nelson* (Iowa), 183.
7. **Trust — estoppel.]** B. executed to S., without consideration, a mortgage on real estate for \$20,000. Defendant bought the mortgage from S., for \$16,600, relying upon an affidavit made by B. that the expressed consideration was the true one. B. afterward sold the premises, the purchaser assuming the mortgage. Defendant sold the mortgage for its face. Plaintiff, as a judgment creditor of B., sued for the difference between the amount so realized and the amount paid by defendant, on the ground of an implied trust. The question of usury was not raised. *Held*, that the action could not be maintained. *Grissler v. Powers* (N. Y.), 475.

MUNICIPAL CORPORATION.

1. **License tax — selling butcher's meat — "agricultural products" — "peddler."] A city authorized to tax all persons exercising within its bounds any profession, trade or calling, may impose a license tax upon persons selling butchers' meat therein, "whether from stalls or shops or by peddling," and upon their wagons used in that business, although "agricultural products" thus sold are exempt, and although such persons reside and have their slaughter-houses and sale shops out of the city, and come into the city simply to deliver to customers, and although farmers selling their own products are exempt, and although such wagons are otherwise taxed as property. *Davis v. Mayor and Council of Macon* (Ga.), 60.**
2. **Negligence in performance of statutory duty.] A city, bound by statute**

MUNICIPAL CORPORATION — *Continued.*

to maintain a draw-bridge as part of a public highway, is not liable to the owner of a vessel for detention caused by the draw being narrower than the law prescribes, nor for the action of the superintendent of the bridge, resulting in delaying the vessel, in the absence of an express statutory liability. *French v. City of Boston* (Mass.), 898.

3. — **stairway adjoining sidewalk.]** A stairway parallel to a city street, but outside the limits of the street and sidewalk, led from the sidewalk to a lower level. The opening was properly fenced along the side of the sidewalk. *Held*, that the city were not bound to maintain a barrier or gate at the entrance of the stairway. *Fitzgerald v. City of Berlin* (Wis.), 814.
4. — **State bridge.]** A city is not bound to prevent access or guard the approaches to a bridge owned by the State, on lands of the State, crossing a State canal within the city boundaries, and constructed for canal purposes, but commonly used by the public as part of a public highway. *Carpenter v. City of Cohoes* (N. Y.), 468.
5. — **surface water.]** Where a city, in grading streets, collects surface water and casts it in a new body on the land of an adjoining proprietor, it is liable for the injury. *Gillison v. City of Charleston* (W. Va.), 763.
6. — **licensing exhibition of animal.]** A city, having for a fee licensed the owner of an animal to erect a booth on a public square and there to exhibit the animal, is not liable for an injury caused by the animal's frightening a horse while such animal was being exercised on the public street outside the booth. *Cole v. City of Newburyport* (Mass.), 894.
7. — **swing bridge—infant.]** A municipal corporation, maintaining a swing bridge in one of its streets, keeping the same safe for persons using ordinary care, is not bound to erect barriers or station watchmen for the protection of young children playing about the same without the knowledge of their parents. *Gavin v. City of Chicago* (Ill.), 99.
8. **Ordinance — disorderly houses.]** Under powers to "suppress and restrain" disorderly houses and to enact ordinances to "improve the morals and order" of the community, a city cannot enact an ordinance declaring the keeping of a disorderly house a misdemeanor, punishable by fine and imprisonment. *City of Chariton v. Barber* (Iowa), 209.
9. — **drunkenness.]** Under a power to "prevent riots, noise, disturbance," etc., and "preserve peace and order," a town may enact an ordinance for the arrest and punishment of persons found intoxicated. *Town of Bloomfield v. Trimble* (Iowa), 212.
10. — **peddling milk.]** A city passed an ordinance authorizing the mayor to grant licenses "to such persons as in his judgment shall appear proper and best calculated to secure to the inhabitants of the city pure and wholesome milk," and prohibiting the sale of milk by any others in the city, and making unauthorized sale a misdemeanor. *Held*, valid. *People ex rel Larrabee v. Mulholland* (N. Y.), 568.

MUNICIPAL CORPORATION — *Continued.*

11. **Public property — execution.]** A house and lot owned by a city, formerly used by them for a fire engine, and still held for the like future use, is exempt from execution. *Curry v. Mayor and Aldermen of Savannah* (Ga.), 74.
12. **— mechanic's lien.]** A court-house is not subject to a mechanic's lien. *Whiting v. Story County* (Iowa), 189.
13. **Power to offer reward.]** County commissioners have no inherent power to offer rewards or employ persons for the detection of crime. *Board of Commissioners of Grant County v. Bradford* (Ind.), 174.
14. **Right to draw water from a private dam.]** The plaintiff had erected and for nineteen years maintained and operated expensive mills on the bank of a river, the power being furnished by a dam at the same time built across the river by him. The supply of water was at some seasons insufficient to drive the mills. The defendant city then erected water-works for its municipal purposes, and supplied them from this pond, by direct draught through pipes and by percolation into adjacent wells, without condemnation or compensation. *Held*, that the city should be enjoined. *City of Emporia v. Soden* (Kans.), 265.
15. **Sewer — inadequate capacity — injunction.]** A municipal corporation, authorized to open and lay out streets, construct sidewalks, and levy taxes therefor, may construct a street sewer for surface water, and a lot-owner cannot enjoin the construction on the ground that it is proposed of inadequate size. *Mayor, etc., of Americus v. Eldridge* (Ga.), 89.
16. **Steam motor in city street.]** A city has no inherent right to authorize or permit the use of steam motors upon railways in its streets, where the fee of the streets is in the city for trust for public uses, and is responsible for personal injury caused through the fright of a horse thereby. *Stanley v. City of Davenport* (Iowa), 216.
17. **Want of seal — estoppel.]** The legislature enacted that a city might abandon its charter and become incorporated under the general law, by a vote of two-thirds of its council, entered in the journal; a copy thereof, under the corporate seal, to be filed in a certain office. Such a vote was passed by the defendant, and the same was entered in the journal; and a copy was filed as required, except that it was not sealed, the defendant having no seal. The defendant had been incorporated for twenty years, and had never had any seal. *Held*, (1) that the provision for the sealing was merely directory; (2) that the defendant was estopped from raising the objection. *Brennan v. City of Weatherford* (Tex.), 758.

See STATUTE, 564.

NATIONAL BANK.

1. **Jurisdiction of State courts over.]** A State court has jurisdiction of an action on contract brought by a resident of the State against a National bank located in another State, except as against a National bank that has

NATIONAL BANK—*Continued.*

committed or is contemplating an act of insolvency. *Robinson v. Nat. Bank of Newberne* (N. Y.), 508.

2. **Attachment.]** An attachment can issue from a State court against a non-resident National bank. *Id.*

NEGLIGENCE.

1. **Canal company — measure of diligence.]** A canal company is not liable as a common carrier for timber lost from rafts transported by it, by theft, sinking, or otherwise. *Watts v. Savannah & Ogeechee Canal Co.* (Ga.), 53.
2. **Contributory — assault and battery.]** The doctrine of contributory negligence has no application in an action of assault and battery. The person assaulted is not bound to retreat. *Steinmetz v. Kelly* (Ind.), 170.
3. **— jumping off train to avoid collision.]** It is not necessarily negligent in a passenger to jump from a rapidly moving railway train, in the attempt to escape from an impending collision. *Wilson v. Northern Pacific R. R. Co.* (Mich.), 410.
4. **— riding on platform of street car.]** A passenger riding on the rear platform of a crowded street car leaned his back against the dasher, and was struck and injured by the pole of a following car. *Held*, that he was not negligent. *Thirteenth & Fifteenth Street Passenger R. Co. v. Boudrou* (Penn. St.), 707.
5. **— of parent.]** A mother allowed her child, seven years old, to serve the drivers and conductors of a street railway with water upon the cars, for a small compensation. While so employed the child was injured by the alleged negligence of the company. *Held*, that the mother was guilty of such contributory negligence as barred her recovery. *Smith v. Hestonville, Mantua & Fairmount Pass. Ry. Company* (Penn. St.), 705.
6. **Want of privity of contract.]** A water company, contracting to supply a city and failing to keep its contract, is not liable to a citizen suffering damage by fire, which the city, in consequence of such breach of contract, was unable to extinguish. *Davis v. Clinton Water Works Co.* (Iowa), 185.
7. **Dangerous premises — invitation.]** A religious society giving public notice of a meeting to be held at its church and inviting members of other societies to attend, is liable to one so invited and attending, for a personal injury sustained by him by means of the dangerous condition of the premises. *Davis v. Central Congregational Society of Jamaica Plain* (Mass.), 868.
8. **Defect in highway — coasting on street.]** Coasting upon hand-sleds on a city street is not a defect or want of repair of a highway, for which the city is liable to one injured thereby. *Pierce v. City of New Bedford* (Mass.), 887.
9. **Omission of flagman at railroad and highway crossing.]** A railroad company is not bound to station a flagman at a highway crossing, however

NEGLIGENCE — *Continued.*

- dangerous, unless it is the custom of railroad companies to station one at such a crossing. *Welsch v. Hannibal & St. Joseph R. R. Co.* (Mo.), 440.
10. Owner of bridge.] The proprietor of a toll-bridge is bound only to ordinary care and diligence. *Stokes v. Tift* (Ga.), 75.
11. Payment of stolen coupon.] The promisor of an interest coupon, numbered, payable to bearer, and one of a large number outstanding overdue, having received notice that it had been stolen, and paying it to the person presenting it, without inquiry, is liable to the true owner, although he had received no offer of indemnity, had been in the habit of paying such coupons as if current, and gave notice to the true owner of the name of the person receiving payment. *Hinckley v. Union Pacific R. R. Co.* (Mass.), 297.
12. Railroad crossing highway — duty of person on highway to stop and listen.] The plaintiff driving over a railway at a highway crossing, his horse caught his foot between the rail and planking, and fell down. For two minutes the plaintiff was busied in trying to disengage the foot, when a train passing broke the horse's leg. *Held*, that the rule that the plaintiff should have stopped, looked and listened before driving on to the track, was not applicable. *Baughman v. Shenango and Allegheny Railroad Company* (Penn. St.), 690.
13. Street railway — evidence of employee's hours of work — duty to stop car for persons approaching track.] A child sixteen months old was injured by being run over by a street railway car. The court admitted evidence of how many hours the drivers and conductors were daily employed, in order to show that the driver was physically unable to discharge his duty at the time. *Held*, error. The court charged that if the driver saw the child in the street, approaching the car, and in such close proximity, that the child might reach the track before the car passed, it was negligent not to stop the car. *Held*, error. *Philadelphia City Passenger Railway Company v. Henrice* (Penn. St.), 699.
14. Signing note without reading.] In an action on a promissory note, by a *bona fide* holder against the makers, the defendants jointly answered that their signatures were procured by the payee's fraud and representation that the note was a different contract, and that one of the makers could not read English, and that the note was incorrectly and fraudulently read to him by the payee. *Held*, insufficient. *Ruddell v. Fhalor* (Ind.), 177.
- See* BANK, 669; CARRIER, 651, 744, 753; CONTRACT, 423; DAMAGES, 756; MASTER AND SERVANT, 343, 491, 521, 620, 684; MUNICIPAL CORPORATION, 99, 393, 394, 468, 763, 814; STATUTE, 198; TRUSTEE, 546.

NEGOTIABLE INSTRUMENT.

1. Acceptance — place of demand.] A draft being accepted without specifying any place of payment, it is sufficient to present it for payment at the place of its date. *Wittkowski v. Smith* (N. C.), 632

NEGOTIABLE INSTRUMENT — *Continued.*

2. **Alteration — sealing note.]** An unauthorized sealing of a negotiable note after execution renders it void. *Vaughan v. Fowler* (S. C.), 781.
3. **— partnership — indorsement.]** A partnership purchased goods, and one of the partners delivered in payment a note of third parties payable to the order of another of the partners, and indorsed by the partner so delivering it, in the name of the payee, but without his knowledge or consent. Subsequently the words "or bearer" were inserted in the note without the knowledge or consent of the makers. *Held*, that the makers were not liable. *McCauley v. Gordon* (Ga.), 68.
4. **Attorney fee — amount blank.]** A promissory note providing for the payment of "— per cent attorney's commissions if collected by legal process," is not negotiable. *Johnston v. Speer* (Penn. St.), 675.
5. **Check — no payee.]** An order for the payment of money, "to order of on sight," drawn on bankers, without specifying any payee or leaving any blank for the insertion of his name, is not a check, and no action lies on it for non-payment. *McIntosh v. Lytle* (Minn.), 410.
6. **Delivery for antecedent debt — bona fide holder.]** A firm, being indebted to the plaintiff, delivered to it a note made by A. for the accommodation of B., and by B. indorsed to the firm; and the plaintiff at the same time surrendered a dishonored check of the firm which they had previously given for the same debt. *Held*, that this did not constitute the plaintiff a *bona fide* holder, so as to exclude proof of a wrongful diversion of the note by the payee. *Phoenix Insurance Company v. Church* (N. Y.), 494.
7. **Delivered blank as to date — fraudulent filling of blank.]** The maker of a note delivered it to the payee, blank as to date, with authority to fill in the dates when the goods for which it was executed should be delivered. Without delivering the goods, the payee filled in the date, and transferred the note to a purchaser in good faith. *Held*, that the latter could maintain an action thereon. *Overton v. Matthews* (Ark.), 9.
8. **Insufficient presentment — recovery of amount paid on, by indorser.]** If a promissory note specifies no place of payment, presentment at the maker's former place of business, without inquiry for his residence, will not bind the indorser; and the note being dishonored, if the indorser pays it to the holder, he may recover the amount so paid on subsequently learning the invalidity of the presentment. *Talbot v. National Bank of the Commonwealth* (Mass.), 302.
9. **Payment — placing funds at place of.]** The maker of a note, payable at the office of his factors, placed sufficient funds there on the day of maturity to pay it. In a subsequent settlement with his factors he was credited with the amount, but the note was not taken up or produced. The factors had transferred it before maturity to a purchaser in good faith who had neglected to present it for payment at maturity. The factors subsequently failed. *Held*, that the transferee could not maintain an ac-

NEGOTIABLE INSTRUMENT — *Continued*.

tion thereon against the maker. *Bank of Charleston National Banking Association v. Zorn* (S. C.), 733.

10. — non-surrender of instrument.] The drawer of a draft paid the amount of it to the indorsee, who had not the possession of the draft, but agreed to get and surrender it, and gave a receipt in full of it. *Held*, that this did not protect the drawer against a suit on the draft by the *bona fide* holder to whom the indorsee had transferred it. *Wilcox v. Aultman* (Ga.), 92.
11. Promise to pay forged note — public policy.] A promise, by one whose indorsement on a note is forged, to pay the same, is void as against public policy. *Shisler v. Vandike* (Penn. St.), 702.
12. Transfer — restrictive indorsement.] The payee of a note indorsed it in blank. The transferee filled up the blank, making the note payable to a bank (without the words "or order") for collection on his account. The bank failing to collect, returned it to him, indorsed by its cashier, "without recourse." He then reindorsed and retransferred it to the plaintiff. *Held*, a valid transfer. *Fawcett v. National Life Insurance Company of the United States* (Ill.), 95.
13. Uncertainty as to time and amount — equities.] An instrument in the form of a note, payable on a certain day, for a certain amount, with counsel fees and expenses of collection if sued or placed in the hands of an attorney for collection, and conditioned that the payee shall have power to declare it due before maturity at any time he may deem it insecure, is not negotiable, and is subject to equities although transferred before maturity. *First National Bank of New Windsor v. Bynum* (N. C.), 604.
14. Implied warranty — accommodation paper.] On the transfer of a bill by the indorsee, there is no implied warranty or representation that it is drawn against funds, or is not accommodation paper; and the indorsee's mere neglect to communicate the fact, known to him, that it is not drawn against funds and is for accommodation, is not fraudulent. *People's Bank of City of New York v. Bogart* (N. Y.), 481.

How executed by public officer.] *See* AGENCY, 139.

Signing by agent.] *See* AGENCY, 22.

Signing without reading.] *See* NEGLIGENCE, 177.

See BILL OF EXCHANGE, 515

NOLLE PROSEQUI

See MALICIOUS PROSECUTION, 680.

NOTES.

Action — by parent for death of minor child, 716.

Adoption — comity, 343.

NOTES—*Continued.*

Bank, savings—regulation about paying on production of pass-book, 670.

Carrier—of passengers—boarding and leaving cars in motion, 884.

—damage to railway by sudden and heavy rain-fall, 749.

Conflict of law—presumption as to foreign law, 584.

Contract—illegal—compromise of crime, 203.

Corporation—subscription to stock, 215.

Deed—quit-claim—recording of, 109.

Delivery—symbolical—when valid in respect to the statute of frauds, 16.

Evidence—antecedent—declarations of deceased—*res gesta*, 88.

—burden of proving negative, 148.

—settlement by principal as against surety, 284.

—judgment against principal—effect of, as to surety, 252.

—alteration of written instrument—question as to when made, 200.

—admission—subscribing witness, 626.

—custom—travelling salesman, 830.

—*See* CONFLICT OF LAW.

Fixtures—mirrors, etc., 472.

Infancy—repudiation—infant's fraud, 413.

Insurance—contract not effected by payment of premium by stranger, 830.

—failure to pay premiums through insanity, 600.

—“burning fluid,” etc., 650.

Judge—arbitrator—civil liability for corrupt action, 188.

Landlord and tenant—apportionment of rent; insurance by tenant for landlord of premises with covenant to repair, 283.

Mortgage—of after-acquired personal property, 728.

Municipal corporation—steam railway in street, 224.

—right to draw water from private dam, 274.

Negligence—contributory—of traveller on highway at railroad crossing—when not bound to stop and listen, 691.

—contributory—riding on platform of street car, 710.

—railroad omitting to maintain flagman at highway crossing, 443.

—of master—general superintendent acting as co-servant, 524.

—when driver of car bound to stop for approaching child at crossing, 701.

Negotiable instrument—restrictive indorsement, 99.

—how executed by public officer, 142.

—attorney fee in, 677.

—promise to pay forged note, 704.

—payment—placing funds at place of, 736.

NOTES — *Continued.*

Office and officer — election — bribery by offering to perform duties for less than legal salary, 422.

Partnership — agreement to work farm on shares, 609.

— levy on individual partner's interest in firm property, 240.

Sale — conditional — title of *bona fide* purchaser from vendee, 664.

Schools — common — modern languages taught in, 129.

Seduction — person seduced cannot sue for, 448.

Statute — extra-territorial force, 160.

— ratifying irregular or voidable contracts or acts, 397.

Stock — transfer — rights as between conflicting claimants, 353.

Surety — *See* EVIDENCE.

Trade-mark — figures, 365.

— fancy-name, 594.

Water — *See* MUNICIPAL CORPORATION.

Water-course — definition of — surface water, 243.

— diversion of, by municipal corporation, 274.

Will — construction — life estate or fee, 104.

NOTICE.

See SURETY, 587.

OFFICE AND OFFICER.

1. **Bribery** — offer by candidate to perform duties for less than legal fees.] A public offer to the electors, by a candidate for public office to perform the duties of the office for less than the legal salary or fees, invalidates his election. *State ex rel. Attorney-General v. Collier* (Mo.), 417.
2. **Public** — ultra vires — ratification by State.] Where an agent of the State, without authority, sells property of the State and takes a note in payment, the legislature may ratify his act and enforce the note. *State v. Terian* (Minn.), 395.

OPINIONS.

See EVIDENCE, 152.

ORDINANCE.

See MUNICIPAL CORPORATION, 209, 212, 536

PARDON

After punishment.] *See* CRIMINAL LAW, 458.

PARENT AND CHILD.

1. **Custody of child** — divorce in another State.] Parents had been divorced by the decree of a Wisconsin court, for the fault of the wife, and the cas

PARENT AND CHILD — *Continued.*

tody of the children had been decreed to the father. The children, respectively four and five years old, were in the care of the mother, living with her parents in Kansas, the latter providing well for them in an elegant home. The mother's conduct since the divorce had been irreproachable. The father was a travelling salesman, generally on the road, and having no home to offer the children, except under the care of his mother or hired servants. On the petition of the father for the possession of the children, *held*, that they should be committed to the custody of the maternal grandmother, upon security to keep them in the jurisdiction of the court and produce them when required, with leave to the father to visit them at her house, or take them away at any time for a day within the county, upon security to return them. *In the Matter of Bort* (Kans.), 255.

2. **Step-father and step-child.]** A step-father who receives his step-child into his family and keeps him as a part of it, cannot recover for his support. *Gerdes v. Weiser* (Iowa), 229.

Action by parent for death of child.] *See* ACTION, 714.

Contributory negligence of parent.] *See* NEGLIGENCE, 705.

See GIFT, 815; MASTER AND SERVANT, 447.

PARTNERSHIP.

1. **Agreement to work farm on shares.]** An agreement to carry on a farm, one furnishing the land, outfit and necessary money; the other furnishing laborers and superintending; half the money furnished to be repaid and the profits to be divided between them; constitutes a partnership. *Reynolds v. Pool* (N. C.), 607.
2. **What does not constitute.]** An agreement between two members of a partnership and a third person, with the knowledge and assent of the other partners, that the third person should share in a certain proportion in the profits and losses of the two contracting partners in the partnership business, does not make such third person a partner or liable for the partnership debts. *Burnett v. Snyder* (N. Y.), 527.
3. **Levy on individual partner's interest in firm's property.]** Partnership property may be seized on attachment or execution against an individual partner, and his interest therein may be sold. *Hershfield v. Clafin* (Kans.), 287.
4. **Notice of dissolution — dealers.]** Agents, clerks and salesmen of one with whom a firm has had dealings are not entitled to actual notice of its dissolution. *Richardson v. Snider* (Ind.), 168.

See NEGOTIABLE INSTRUMENT, 68.

PAYMENT.

By sheriff.] *See* SUBROGATION, 794.

Voluntary and excessive.] *See* ADMINISTRATOR, 670.

See NEGOTIABLE INSTRUMENT, 92, 783.

INDEX.

PHOTOGRAPHS.

See EVIDENCE, 588.

PLEDGE.

See EXECUTOR, 694.

PRECATORY WORDS.

See WILL, 572.

PRESENTMENT.

See NEGOTIABLE INSTRUMENT, 302, 632.

PRESUMPTION.

See EVIDENCE, 583.

PRIVILEGED COMMUNICATION.

See TELEGRAPH, 426.

PROMISE.

Voluntary, by public officer, to pay amount omitted by mistake on settlement.] A county treasurer's accounts were settled and became a judgment, final and conclusive. Subsequently an innocent error was discovered in favor of the county, and the treasurer orally promised his successor to pay the amount. *Held*, an enforceable promise. *Stebbins v. County of Crawford* (Penn. St.), 687.

To pay forged note.] *See NEGOTIABLE INSTRUMENT, 702.*

PUBLIC POLICY.

Promise to pay forged note.] *See NEGOTIABLE INSTRUMENT, 702.*

See CONTRACT, 93.

RAFTS.

See CONSTITUTIONAL LAW, 387

RAILROADS.

Contract between connecting.] *See BAILMENT, 404.*

Omission to station flagman at highway crossing.] *See NEGLIGENCE, 449.*

See CARRIER.

RATIFICATION

See OFFICER, 395.

RECEIPT.

See EVIDENCE, 339.

REGISTRATION.

See DEED, 105.

RES GESTÆ.

See CRIMINAL LAW, 76.

REWARD.

Power to offer.] *See* MUNICIPAL CORPORATION, 174.

RIPARIAN OWNER.

See WATER AND WATER-COURSE, 899.

SALE.

1. **Conditional — title of bona fide purchaser from vendee.]** Furniture was sold upon the written agreement of the purchaser to pay not less than five dollars a week until the price was paid, the goods to be and remain the property of the seller, subject to removal upon failure to make any or all of such payments. The furniture was delivered to the purchaser, and he failed to make any payment, and sold it to a third person who had no knowledge of the agreement. *Held*, that the latter got valid title. *Stoddard v. Huntsman* (Penn. St.), 661.
2. **By mortgagee of chattels — warranty.]** On a sale of chattels, announced as made by virtue of a mortgage, there is no implied warranty of title. *Harris v. Lynn* (Kans.), 253.
3. **Part delivery — recovery pro tanto.]** The plaintiff contracted to sell and deliver 699 boxes of glass to defendant, delivery to be made at one time. Prior to any delivery the defendant wrote to plaintiff asking for immediate delivery of a small portion, and plaintiff thereupon delivered 365 boxes. The defendant received and used this quantity, and afterward wrote that he wished the order completed in a reasonable time. A correspondence ensued as to the terms of the agreement. The plaintiff subsequently offered to complete, but defendant declined on the ground that the time had elapsed. *Held*, that the plaintiff could recover for the amount delivered. *Avery v. Willson* (N. Y.), 503.
4. **In fact, through supposed agent]** If one sells goods in fact to a second, supposing that the sale is really to a third through the second as his agent, and solely in reliance on the third, although the second sells them to the third, the first cannot recover therefor from the third. *Stoddard v. Ham* (Mass.), 369.

SAVINGS BANK.

See BANK, 669.

SCHOOLS.

Common — modern languages taught in.] Under the provision of the school law allowing instruction in "such other branches, including vocal music and drawing," as may be prescribed by the directors or voters, any modern language may be taught. *Powell v. Board of Education* (Ill.) 123.

INDEX.

SEAL.

See MUNICIPAL CORPORATION, 758; NEGOTIABLE INSTRUMENT, 781.

SEWER.

See MUNICIPAL CORPORATION, 89.

SHIP AND SHIPPING.

See CARRIER, 87.

SIDEWALK.

See MUNICIPAL CORPORATION, 814.

SPECIFIC PERFORMANCE.

Contract void by statute of frauds but partly executed.] Defendants orally agreed to take a lease of plaintiff's stores for five years, thus inducing him to break off negotiations for leasing to another party, and to incur expense in altering and adapting the stores to their own use. Defendants entered into possession and paid rent for two years, but neglected to execute the written lease in accordance with the agreement tendered them by plaintiff on taking possession, and at the end of two years refused to execute the lease, or longer to occupy or pay rent. *Held*, that they should be adjudged to execute the lease. *Seaman v. Aschermann* (Wis.), 849.

STATUTE.

1. **Construction — municipal power to regulate slaughter-houses — prohibition.]** A power conferred upon a city in its charter to "regulate the erection, use and continuance of slaughter-houses" within the city, includes the power of total prohibition within specified limits or localities. *Cronin v. People* (N. Y.), 564.
2. **Definition.]** "To resort" means to go once. *State v. Ah Sam* (Nev.), 455.
3. **— negligence — co-servant — detective and engineer.]** Under a statute making railroad companies liable to their employees for injuries sustained by them by the negligence of their other employees, a railroad company is liable for an injury suffered by a detective in its employ, while in the discharge of his duty, through the negligence of an engineer on a passenger train. *Pyne v. Chicago, Burlington & Quincy R. R. Co.* (Iowa), 198.
4. **Extra-territorial force.]** A statute, authorizing a woman to prosecute an action in Indiana for her own seduction, gives her no right of action where the seduction was accomplished in another State, although the illicit intercourse continued in Indiana. *Buckles v. Ellers* (Ind.), 156.
5. **Excise.]** A statute defines intoxicating liquors as "all liquors and mixtures, by whatever name called, that will produce intoxication." *Held*, not to embrace medicines and toilet articles, not ordinarily used as beverages, such as tincture of gentian, bay rum, and essence of lemon, although containing alcohol. Whether it embraces "McLean's Strengthening Cordial and

STATUTE — *Continued.*

Blood Purifier," a mixture of whisky, syrup of tulu and syrup of wild cherry, and "Sherman's Prickly Ash Bitters," is a question of fact. *Intoxicating Liquor Cases* (Kans.), 284.

See CONSTITUTIONAL LAW, 455.

STATUTE OF FRAUDS.

1. **Promise to indemnify for becoming bail.]** An oral promise to indemnify another for becoming bail for a third, indicted for felony, is not within the statute of frauds, and is enforceable. *Anderson v. Spence* (Ind.), 162.
2. **Promise to pay debt of another out of his property.]** An oral promise to pay the debt of another out of his property placed in the hands of the promisor for that purpose, is not within the statute of frauds. *Mason v. Wilson* (N. C.), 612.
3. **Symbolical delivery — when valid.]** Parties orally agreed for the purchase and sale of a lot of cotton, consisting of six bales, weighed and stored in a warehouse, and the seller gave the purchaser an order on the warehouseman for it. The seller notified the warehouseman of the sale and the purchaser applied to him for the cotton, but delivery was postponed by agreement of the warehouseman and the purchaser until the next morning. No money passed, and no other writing was executed. *Held*, a valid delivery and acceptance. *King v. Jarman* (Ark.), 11.

See SPECIFIC PERFORMANCE, 850.

STEPFATHER.

See PARENT AND CHILD, 239.

STOCK.

Transfer — rights between purchaser and assignee in bankruptcy.] The owner of National bank stock delivered his certificate, with a power of attorney to transfer the stock, as collateral security for his note. The by-laws of the bank provided that stock was assignable only on its book, subject to the National Banking Act, and that a transfer book should be kept, and that the old certificates should be surrendered and new ones issued. The owner of the stock afterward went into bankruptcy. On notice to him and his assignee the payee sold the stock, and the bank, refusing the demand of the assignee for a transfer, transferred it to the purchaser. *Held*, that the bank was not liable to the assignee for a conversion. Also *held*, that evidence was incompetent to show that the original transfer was kept secret, in order that the owner, a director of the bank, might get a false credit at the bank, the bank having no knowledge or notice of the arrangement. *Dickinson v. Central National Bank* (Mass.), 851.

Subscription to.] *See* CORPORATION, 218.

STOCKHOLDERS.

See CORPORATION, 129.

STREET.

Steam-motor in.] *See* MUNICIPAL CORPORATION, 216.

See MUNICIPAL CORPORATION, 814.

STREET RAILWAY.

Duty to stop car for persons approaching track.] *See* NEGLIGENCE, 603.

Riding on platform of car.] *See* NEGLIGENCE, 707.

SUBPOENA.

See TELEGRAPH, 426.

SUBROGATION.

1 Assignment.] Unauthorized payment by a stranger does not discharge a debt, nor authorize a suit at law by him, unless the debtor ratifies such payment by pleading or reliance; but in equity the stranger will have relief, and in case of an agreement for an assignment of the debt the stranger may enforce the demand without an actual assignment. *Nesly v. Jones*, (W. Va.), 794.

2. Payment of judgment-debt by sheriff.] A sheriff, having or having had an execution in his hands, may pay the judgment-debt to the creditor, and have the same rights against the debtor as a stranger, whether he takes an assignment of the judgment or not. *Id.*

SUBSCRIPTION.

To stock.] *See* CORPORATION, 213.

SUNDAY.

"Business"—lending money.] Lending money to be repaid on demand is "business," within the meaning of the statute prohibiting "labor, business or work, except only works of necessity or charity," on Sunday, and such an agreement is presumptively void, although the money is retained and used, without any offer to return it. *Troewert v. Decker* (Wis.), 808.

2. Criminal judgment on.] A criminal judgment of a justice of the peace rendered on Sunday is void. *Ex parte White* (Nev.), 466.

SURETY.

1. Evidence—settlement by principal.] In an action on a county treasurer's bond, the principal's accountings and settlements, made in pursuance of law, are conclusive against him and his sureties, in the absence of mistake. *Boone County v. Jones* (Iowa), 229.

2. Judgment against principal—res adjudicata.] In an action under a statute to make the sureties of a sheriff parties to and bound by a judgment of

SURETY — *Continued.*

amercement against their principal, such judgment is not conclusive on the sureties, but only *prima facie* evidence of liability. *Graces v. Bulkeley* (Kans.), 249.

3. **Notice to sue principal — requisites of — when delay excused.]** A few weeks before the maturity of a mortgage a surety for its payment told the holder to collect the mortgage "and not to let it run over the time it is due." The holder delayed three years. The mortgagor was insolvent at the maturity of the mortgage and so remained. There was no finding that the property would then have brought more than at the time of the suit on trial, and no evidence of the extent of depreciation, if any. *Hunt v. Purdy* (N. Y.), 587.
4. **For officer — re-election of principal.]** A cashier of a savings bank gave bond with sureties for faithful performance. The bond was required by the by-laws. It was silent as to the term. A statute prescribed the term as one year and until the election of his successor. He was twice annually re-elected, but gave no new bond. In the third year he defaulted. *Held*, that his sureties were not liable. *Savings Bank of Hannibal v. Hunt* (Mo.), 449.
5. **Relation not appearing on face of instrument — defense.]** If one has executed an instrument, apparently as principal but really as surety, he is bound to the creditor as principal unless the creditor knew the true character of the obligation. *Goodman v. Litaker* (N. C.), 602.

SURFACE WATER.

See MUNICIPAL CORPORATION, 763; WATER AND WATER-COURSE, 150, 241, 497.

SURVIVORSHIP.

Contract as to.] *See* CONTRACT, 1.

TELEGRAPH.

Messages not privileged — subpoena to produce.] An agent of a telegraph company is punishable for contempt in refusing to produce messages in possession of the company, before a grand jury, on proper process; but a subpoena *duces tecum*, merely describing such messages by the names of the senders and persons addressed, and as sent "within fifteen months last past," is not such process. *Ex parte Brown* (Mo.), 426.

TENANTS IN COMMON.

See CONTRACT, 1.

TRADE-MARK.

1. **Figures with device.]** The figures "523," on hosiery, in combination with a wreath and an eagle, and used to denote the grade and the origin of the

TRADE-MARK — *Continued.*

manufacture, are a valid trade-mark. *Lawrence Manufacturing Company v. Lowell Hosiery Mills* (Mass.), 862.

2. "Pride" cigars.] "Pride" is a good trade-mark for cigars, and its use by others than the original user will be restrained, although accompanied by distinctive labels. *Hier v. Abrahams* (N. Y.), 589.
3. "Shaver wagon, Eldora". The plaintiff had for several years made wagons at Eldora, and painted on them in one general style the words "Shaver wagon, Eldora." The defendant, his brother, had been his employee, and later his partner in that business. The firm was dissolved, and the plaintiff acquired its property and continued the business. Two years after, the defendant set up the same business in the same town, and painted the same words on his wagons, in the plaintiff's general style, but with slight changes in form, and adding his own initials. The resemblance was calculated to deceive the public. *Held*, that the defendant should be restrained. *Shaver v. Shaver* (Iowa), 194.

TRIAL.

See CRIMINAL LAW, 109, 643.

TROVER.

Defense of title in a third.] In trover it is a good defense that the property belongs to a third, between whom and the defendant there is no privity. *Boyce v. Williams* (N. C.), 618.

TRUST.

Receipt of proceeds of mortgaged chattels for debt.] The owner of mortgaged cattle sold them, and with the proceeds paid his debt to a bank in another county, where the mortgage was not filed, the cashier having no knowledge of the circumstances except that the money arose from a sale of cattle. *Held*, that the bank was not liable to the holder of the mortgage for the proceeds. *Burnett v. Gustafson* (Iowa), 190.

See GIFT, 371; MORTGAGE, 475.

TRUSTEE.

Of savings bank — personal liability for negligence.] A savings bank was incorporated in 1867, and up to 1875, when a receiver was appointed, did business in leased premises. The deposits in the bank at no time exceeded about \$70,000, and during each year but one the expenses of the bank, including interest to depositors, exceeded its income. At a time when the bank was substantially insolvent, the trustees purchased a lot costing \$29,000, on which a building for the use of the bank, costing \$27,000, was erected. In 1875, a receiver was appointed, and this building and lot subject to a mortgage, and other assets, producing only about \$1,000, constituted the whole property of the bank, and the lot and building were

TRUSTEE — *Continued.*

afterward swept away by the mortgage. In an action by the receiver against the trustees for the loss, *held*, that a jury were justified in finding that the trustees failed in exercising the prudence which the law requires, and were liable for the loss sustained. *Hun v. Cary* (N. Y.), 546.

ULTRA VIRES.

See OFFICER, 895.

USURY.

Contract made in one State to be executed in another.] The plaintiff, a Pennsylvania banking corporation, agreed in that State with defendant, a citizen of New York, for the renewal of a note, made by the latter and held by the former. The renewal note was made, dated, and payable in New York, and was mailed by the defendant to the plaintiff, with a check for the discount. The discount was at a rate lawful in Pennsylvania but unlawful in New York. *Held*, that the note was not usurious in New York. *Wayne County Savings Bank v. Low* (N. Y.), 533.

VERDICT.

Presence of prisoner at.] *See* CRIMINAL LAW, 643.

See CRIMINAL LAW, 845.

WAIVER.

See INSURANCE, 501.

WARRANTY.

In chattel mortgage sales.] *See* SALE, 253.

Implied.] *See* NEGOTIABLE INSTRUMENT, 481.

WATER AND WATER-COURSE.

1. Surface water.] Where surface water, supplied by the falling rains and melting snow from a hilly region or high bluffs, by the natural formation of the ground is forced to seek an outlet through a gorge or ravine, and by its flow assumes a definite and natural channel through which it escapes at regular seasons, and such has always been the case within the memory of man, one adjacent land-owner has no right to obstruct such flow, to the damage of another. *Gibbs v. Williams* (Kans.), 241.

2. Definition of.] But there must be a distinct channel, the bed of a stream, with well-defined banks, cut through the turf and into the soil by the flowing of the water; presenting on a casual glance to every eye the unmistakable evidences of the frequent action of running water; and not a mere depression; and such flow must be necessary to prevent the flooding of a considerable tract of land. *Id.*

3. Surface water — concentration and increase on another's land.] The owner of an upper field may not so concentrate surface water upon his

WATER AND WATER-COURSE—*Continued.*

own land as to increase its natural flow upon a lower field of another
Templeton v. Voshloe (Ind.), 150.

4. ——— obstruction.] The surface water on the plaintiff's land ordinarily drained into a natural water-course flowing through his land and the defendant's. The plaintiff opened a quarry on his land, and in the winter the surface water, the snow water, and the water from small streams cut off by the excavation accumulated in the excavation. In the spring the plaintiff pumped the water from the excavation into the water-course. During this process the flow was greater than usual, but the capacity of the water-course was sufficient to carry it all off, together with the natural body of the stream. Defendant filled up the channel and dammed the stream, thus throwing back the water on plaintiff's land. *Held*, that the plaintiff could compel the removal of such obstructions, and restrict such interference with the flow of the stream. *McCormick v. Horan* (N. Y.), 479.

5. Riparian rights in navigable stream.] The State may authorize a riparian owner upon a stream not navigable at the point in question but becoming navigable below, to dam the stream and use the water for his purposes, but not to the injury of other riparian owners. *Morrill v. St. Anthony Falls Water-Power Company* (Minn.), 399.

See MUNICIPAL CORPORATION, 265.

WILL.

1. Construction — legacy, how shared.] A testator bequeathed a fund as follows: in equal shares, one to his married daughter, Melinda; one to Amanda, Anna and Clara, his minor daughters; and one to each of two other married daughters for life. *Held*, that the three minor daughters took each one equal share with the others. *Holman v. Price* (N. C.), 614.
2. ——— life estate or fee.] A will contained the following clause: "To my beloved wife P. (so long as she remains my widow) I give all the income of the home farm, on which I now live, containing two hundred acres, more or less, with all the tenements and appurtenances belonging thereto, together with all the products arising therefrom; also, the mansion house in which I live, together with all belonging to it, and all that is in it, or about it, I give to my beloved wife P., the same to be hers and to belong to her forever." *Held*, that the widow took an estate in the realty for life and widowhood, and an absolute estate in the personal property. *Cooper v. Pogue* (Penn. St.), 681.
3. ——— ——— remainder.] A testator gave and bequeathed to his wife "the farm on which we now reside, situate," etc, "also all my personal property of every description, so long as she remains my widow; at the expiration of that time, the whole, or whatever remains, to descend to my daughter." *Held*, that the widow took only a life estate in the real as well as the personal property, and that the daughter took a vested remainder in both. *Green v. Hewitt* (Ill.), 102.

WILL — *Continued.*

4. **Evidence — legacy — debt of testator to legatee.]** A testator was indebted to his adopted daughter in an unliquidated amount for services. By his will he provided legacies for her and her daughter "after payment of debts," to a less amount than the value of the services. *Held*, that evidence was inadmissible to show his declarations that the legacies were intended as compensation for the services, and that there was no presumption to that effect. *Reynolds v. Robinson* (N. Y.), 555.
5. **Joint.]** A joint will, conditioned to take effect on the death of both, is invalid. *Hershy v. Clark* (Ark.), 1.
6. **Precatory words.]** A testator gave and bequeathed all his property to his wife, "only requesting her, at the close of her life, to make such disposition of the same among my children and grandchildren as shall seem to her good. *Held*, that the gift to the wife was absolute. *Foss v. Whitmore* (N. Y.), 572.

..... WITNESS.

Disqualification by foreign conviction.] One convicted in another State of an infamous offense is thereby disqualified from testifying in Nevada. *State v. Foley* (Nev.), 458.

Proof by subscribing.] *See* EVIDENCE, 624.

WORDS.

"Agricultural products."] *See* MUNICIPAL CORPORATION, 60.

"Business."] *See* SUNDAY.

"Extorsively."] *See* CRIMINAL LAW, 44

"Incumbrance."] *See* INSURANCE, 830.

"Keep, have or use;" "burning fluid or chemical oils."] *See* INSURANCE, 647.

"One pint;" "five gallons."] *See* CRIMINAL LAW, 415.

"Passenger."] *See* CARRIER, 382.

"Peddler."] *See* MUNICIPAL CORPORATION, 60.

"Refined coal or earth oils."] *See* INSURANCE, 501,

"Regulate."] *See* STATUTE, 564; MUNICIPAL CORPORATION, 508.

"Resort."] *See* CONSTITUTIONAL LAW, 455.

"Vacant and unoccupied."] *See* INSURANCE, 488.

"Water-course."] *See* WATER AND WATER-COURSE, 241.



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